No. 01-757-CFX Title: Syngenta Crop Protection, Inc., Robert Babb, Edee Templet, and Kenneth A. Devun, Petitioners
v.
Hurley Henson

Docketed:
November 29, 2001 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Nov 8 2001	Petition for writ of certiorari filed. (Response due December 29, 2001)
	Dec 27 2001	Brief of respondent Hurley Henson filed.
	Jan 2 2002	DISTRIBUTED for Conference of January 18, 2002
	Jan 16 2002	REDISTRIBUTED for Conference of February 15, 2002
	Feb 19 2002	Petition GRANTED. SET FOR ARGUMENT October 15, 2002. **********
	Mar 25 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including April 22,2002.
	Apr 12 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including May 6, 2002.
	May 3 2002	Joint appendix filed.
	May 3 2002	Brief of petitioners Syngenta Crop Protection, et al. filed.
	May 6 2002	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
	Jun 4 2002	Brief of respondent Hurley Henson filed.
	Jun 4 2002	Brief amicus curiae of Trial Lawyers for Public Justice filed.
	Jun 4 2002	Brief amicus curiae of Texas filed.
	Jun 5 2002	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Jun 6 2002	Motion of Texas for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jun 28 2002	Motion of Texas for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
	Jul 10 2002	Reply brief of petitioner Syngenta Crop Protection filed.
	Aug 1 2002	CIRCULATED.
	Oct 15 2002	ARGUED.

Supreme Court, U.S.
FILED

01 757 NOV 08 2001

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC., ROBERT BABB, EDEE TEMPLET, AND KENNETH A. DEVUN,

Petitioners,

v.

HURLEY HENSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

HENRY B. ALSOBROOK, JR.
Counsel of Record
MARK C. SURPRENANT
ROBERT N. MARKLE
VALERIA M. SERCOVICH
ADAMS AND REESE LLP
Attorneys for Petitioners
4500 One Shell Square
New Orleans, Louisiana 70139
(504) 581-3234

170440

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the All Writs Act, 28 U.S.C. § 1651(a), vests federal district courts with authority to exercise removal jurisdiction under 28 U.S.C. § 1441 over lawsuits brought in state court when the state court suit threatens the integrity of the federal court's rulings in ongoing complex litigation.[1]

---

1. While acknowledging that five Circuits have taken a contrary position, the Court of Appeals for the Eleventh Circuit in this case, becoming the fourth Circuit to do so, held that the All Writs Act provides no such authority.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Syngenta Crop Protection, Inc., was formerly known as Novartis Crop Protection, Inc., which was formerly known as Ciba-Geigy Corporation. Its parent corporation is Syngenta Seeds, Inc., and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	7
I. The Eleventh Circuit's Determination that the All Writs Act Cannot Support Removal Jurisdiction Conflicts with the Contrary Determinations of the Second, Third, Sixth, Seventh, and Eighth Circuits, Further Aggravating the Pre-Existing Circuit Split	7
II. The Question Presented is Important	14
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Baker Perkins, Inc. v. Werner & Pfleiderer Corp., 710 F.2d 1561 (CA Fed. 1983) 7

Bylinski v. City of Allen Park, 169 F.3d 1001 (CA6), *cert. denied*, 527 U.S. 1037 (1999) 4, 10

Commercial Sec. Bank v. Walker Bank & Trust Co., 456 F.2d 1352 (CA10 1972) 12

Davis v. Glanton, 107 F.3d 1044 (CA3), *cert. denied*, 522 U.S. 859 (1997) 5, 11

Hartman v. Diamond Shamrock Chems. Co., 510 U.S. 1140 (1994) 5

Hillman v. Webley, 115 F.3d 1461 (CA10 1997) 5, 12, 13, 14

In re Agent Orange Prods. Liab. Litig., 996 F.2d 1425 (CA2 1993), *cert. denied sub nom., Ivy v. Diamond Shamrock Chems. Co.*, 510 U.S. 1140 (1994) 5, 10, 11, 12

In re VMS Secs. Litig., 103 F.3d 1317 (CA7 1996) 5, 11, 12

Page

Nat'l Ass'n for the Advancement of Colored People v. Metro. Council, 125 F.3d 1171 (CA8 1997) ("*NAACP I*"), *vacated and remanded for reconsideration*, 522 U.S. 1145 (1998), *reinstated upon reconsideration*, 144 F.3d 1168 (CA8) ("*NAACP II*"), *cert. denied*, 525 U.S. 826 (1998) 4, 8, 14

Rivet v. Regions Bank of Louisiana, 522 U.S. 470 (1998) 13, 14

Sable v. Gen. Motors Corp., 90 F.3d 171 (CA6 1996) 4, 8, 9

Texas v. Real Parties in Interest, 259 F.3d 387 (CA5 2001) 7, 13

United States v. Am. Soc'y of Composers, Authors, & Publishers, 32 F.3d 727 (CA2 1994) 5

United States v. City of New York, 972 F.2d 464 (CA2 1992) 5

United States v. New York Tel. Co., 434 U.S. 159 (1977) 6, 9, 10, 11, 12, 13

Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C., 992 F.2d 932 (CA9 1993) 5, 6

Xiong v. Minnesota, 195 F.3d 424 (CA8 1999) 4, 7, 8

Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (CA2 1988), *cert. denied*, 489 U.S. 1077 (1989) 5

Cited Authorities

	Page
Statutes:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1404(a)	3
28 U.S.C. § 1441	i, 3, 4
28 U.S.C. § 1441(a)	1, 6
28 U.S.C. § 1651(a)	i, 1

TABLE OF APPENDICES

	Page
Appendix A — Per Curiam Opinion And Judgment Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed August 14, 2001	1a
Appendix B — Order Of The United States District Court For The Southern District Of Alabama, Southern Division In *Price, et al. v. Ciba-Geigy Corporation* Dated And Filed November 24, 1998	15a
Appendix C — Order Of The United States District Court For The Southern District Of Alabama, Southern Division In *Henson, et al. v. Ciba-Geigy Corporation, et al.* Dated And Filed November 24, 1998	18a

Syngenta Crop Protection, Inc., Robert Babb, Edee Templet, and Kenneth A. Devun respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-12a, is reported at 261 F.3d 1065. The opinion of the district court, App., *infra*, 15a-18a, is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on August 14, 2001. App., *infra*, 13a-14a. No one filed a petition for rehearing. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Section 1441(a) of the Judicial Code, 28 U.S.C. § 1441(a), provides that

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district

court of the United States for the district and division embracing the place where such action is pending. . . .

STATEMENT OF THE CASE

Along with six other individuals, Respondent Hurley Henson filed a class action suit against Petitioners Syngenta Crop Protection, Inc., Robert Babb, Edee Templet, and Kenneth A. Devun. Henson filed the suit in the 18th Judicial District Court for the Parish of Iberville, Louisiana, on behalf of all individuals who worked at the Syngenta facility in St. Gabriel, Louisiana. He sought damages for injuries resulting from exposure to various chemicals, including chlordimeform, an active ingredient in a pesticide Syngenta manufactures, and atrazine, a Syngenta herbicide.

Another class action, *Price v. Ciba-Geigy Corp.*, No. 94-0647, involving virtually identical claims, had been filed in the circuit court of Mobile County, Alabama. Defendants in that case removed it to the United States District Court for the Southern District of Alabama, which certified a nationwide class. Later, that court approved a structured, class-wide settlement.

The Louisiana state court stayed Respondent Henson's suit when he and others successfully intervened in *Price* and participated in the *Price* settlement. As a component of the settlement, a stipulation was entered requiring, among other things, that Henson's case (including all claims against Syngenta and the individual defendants) be dismissed.

Once the Alabama federal court approved the *Price* settlement, making the stipulation a part of its judgment

approving the class settlement, class counsel in *Price* complied with the stipulation and prompted the Louisiana state court to enter an order to show cause why the action should not be dismissed because of the stipulation. Henson's Louisiana counsel, who had represented Henson and the others in the *Price* proceedings and who had signed the stipulation on their behalf, told the Louisiana court that the *Price* settlement required dismissal only of those claims concerning chlordimeform and not of claims resulting from exposure to other chemicals.

This was incorrect because the stipulation named the entire *Henson* action by docket number and said nothing about dismissing only certain claims. But counsel's representation successfully lured the Louisiana court into inviting Henson and the other plaintiffs to amend their petition to assert tort claims arising from exposure to atrazine. And amend they did.

Once that happened, Syngenta and the three individual defendants removed the case, in accordance with 28 U.S.C. § 1441, to the United States District Court for the Middle District of Louisiana based on the All Writs Act. Concurrently, under 28 U.S.C. § 1404(a), the defendants filed, and the court granted, a motion to transfer the case to the Southern District of Alabama.

Shortly after the case arrived, the Southern District of Alabama dismissed *Henson* as barred by the stipulation in the *Price* settlement. In addition, the court, exercising jurisdiction in the *Price* case itself, ordered Henson's counsel to pay Syngenta the legal fees it incurred in enforcing the *Price* settlement as a result of Henson's counsel's efforts to thwart it.

On Henson's appeal, the Court of Appeals for the Eleventh Circuit affirmed the district court's imposition of sanctions on Henson's counsel. App., *infra*, 6a,12a. Concluding, however, that the district court lacked subject matter jurisdiction over the removed case, the court vacated the trial court's judgment dismissing *Henson* and remanded with instructions to remand the case to the Louisiana state court. App., *infra*, 10a, 12a.

In so doing, the Eleventh Circuit explained that whether a district court has jurisdiction under the All Writs Act over an action removed under § 1441 was, in the Eleventh Circuit, an open question. It also acknowledged that the "circuits have split in addressing similar questions of federal courts' power under the All Writs Act to protect judgments and control diehard litigants." App., *infra*, 8a.

Indeed, it recognized that the Sixth and Eighth Circuits have held that state-court suits that could produce judgments undermining federal consent orders — and in one case a state-court action that was merely barred by the preclusive effect of a federal consent decree — are removable under § 1441, with original subject-matter jurisdiction supplied by the All Writs Act. App., *infra*, 8a (citing *Xiong v. Minnesota*, 195 F.3d 424, 426 (CA8 1999); *Bylinski v. City of Allen Park*, 169 F.3d 1001, 1003 (CA6), *cert. denied*, 527 U.S. 1037 (1999); *Nat'l Ass'n for the Advancement of Colored People v. Metro. Council*, 125 F.3d 1171, 1174 (CA8 1997) ("*NAACP I*"), *vacated and remanded for reconsideration*, 522 U.S. 1145 (1998), *reinstated upon reconsideration*, 144 F.3d 1168, 1169 (CA8) ("*NAACP II*"), *cert. denied*, 525 U.S. 826 (1998); *Sable v. Gen. Motors Corp.*, 90 F.3d 171, 175 (CA6 1996)).

The Eleventh Circuit recognized that the Second Circuit, too, has taken a similar approach, holding that a district court may, on motion of parties to an action over which it has jurisdiction, order a common-law removal to federal court of a state-court action, even if there is no other basis for federal subject-matter jurisdiction, when the prosecution of the state-court action threatens the integrity of a consent decree or judgment entered in the federal action. App., *infra*, 8a (citing *In re Agent Orange Prods. Liab. Litig.*, 996 F.2d 1425, 1431 (CA2 1993), *cert. denied sub nom., Ivy v. Diamond Shamrock Chems. Co.*, 510 U.S. 1140 (1994) and *Hartman v. Diamond Shamrock Chems. Co.*, 510 U.S. 1140 (1994); *United States v. City of New York*, 972 F.2d 464, 469 (CA2 1992); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 855 (CA2 1988), *cert. denied*, 489 U.S. 1077 (1989); *United States v. Am. Soc'y of Composers, Authors, & Publishers*, 32 F.3d 727, 731 (CA2 1994) (All Writs Act provides independent ground of federal subject-matter jurisdiction of motion to vacate an arbitral award, when the parties arbitrated according to the terms of a preexisting federal consent decree)).

The Eleventh Circuit also acknowledged that both the Seventh Circuit and the Third Circuit have embraced the Second Circuit rule. App., *infra*, 9a (citing *In re VMS Secs. Litig.*, 103 F.3d 1317 (CA7 1996); *Davis v. Glanton*, 107 F.3d 1044 (CA3), *cert. denied*, 522 U.S. 859 (1997)).

On the other hand, the Eleventh Circuit recognized that the minority of courts have taken a less expansive view. App., *infra*, 9a (citing *Hillman v. Webley*, 115 F.3d 1461, 1469 (CA10 1997) (All Writs Act does not furnish removal jurisdiction at all because it confers no independent jurisdiction); *Westinghouse Elec. Corp. v. Newman &*

Holtzinger, P.C., 992 F.2d 932, 937 (CA9 1993) (All Writs Act may be invoked by a district court only in aid of jurisdiction it already has)).

Casting its lot with the minority, the Eleventh Circuit concluded that the district court lacked removal jurisdiction over the *Henson* case. App., *infra*, 10a. The court based its conclusion on two principles. First, § 1441(a) authorizes removal only of actions over which the district courts have original jurisdiction. This means that actions are not removable unless they originally could have been filed in federal court. The implication of that rule, noted the court, is that removal is proper only if the All Writs Act could have furnished subject-matter jurisdiction over the *Henson* action if it had first been filed in federal court. Second, the All Writs Act does not provide an independent basis of federal subject matter jurisdiction, *i.e.*, a plaintiff cannot sue invoking only the court's All Writs power. App., *infra*, 10a.

The Eleventh Circuit rejected the argument that the All Writs Act is jurisdictional "caulk" — plugging the cracks in federal jurisdiction through which crafty litigants can escape the effect of a federal order. App., *infra*, 11a (citing *United States v. New York Tel. Co.*, 434 U.S. 159, 172-73 (1977)) (articulating this broad view of the All Writs Act's purpose). The court disagreed with the argument that the Act authorizes virtually any exercise of authority that is convenient for effectuating a federal judgment, including the exercise of removal jurisdiction over a different action whose prosecution is inconsistent with a federal judgment. It concluded that this reasoning goes too far — *i.e.*, that too elastic an interpretation of the All Writs Act perverts it from a tool for effectuating Congress's intent in conferring jurisdiction on the federal courts to a device for judicially

re-equilibrating a state-federal balance that is Congress's to strike. App., *infra*, 11a.

Accordingly, the Eleventh Circuit vacated the district court's order dismissing *Henson* and remanded to the district court with instructions to that court to remand *Henson* to the Louisiana state court. App., *infra*, 12a.

REASONS FOR GRANTING THE WRIT

As the Eleventh Circuit acknowledged, App., *infra*, 8a-11a, its decision in this case conflicts with decisions of the Second, Third, Sixth, Seventh, and Eighth Circuits, while agreeing with those of the Ninth and Tenth Circuits. Recently, the Fifth Circuit, in *Texas v. Real Parties in Interest*, 259 F.3d 387 (CA5 2001), a case not cited by the Eleventh Circuit, appears to have agreed with the Eleventh Circuit's approach. The tally, therefore is 5-4,[2] yielding the sort of disarray that this Court should act to harmonize. Beyond that, the Eleventh Circuit's decision is erroneous, and the issue it has resolved is an important one.

I. The Eleventh Circuit's Determination that the All Writs Act Cannot Support Removal Jurisdiction Conflicts with the Contrary Determinations of the Second, Third, Sixth, Seventh, and Eighth Circuits, Further Aggravating the Pre-Existing Circuit Split

In *Xiong*, the Eighth Circuit faced the same issue as did the Eleventh Circuit here. The Eighth Circuit concluded that because federal court control of the removed class action suit was necessary to effectuate and prevent the frustration of a consent

2. *See also Baker Perkins, Inc. v. Werner & Pfleiderer Corp.*, 710 F.2d 1561, 1565 (CA Fed. 1983) (All Writs Act is not an independent basis of jurisdiction) (*dictum*).

decree in an earlier federal class action case, one over which the district court had retained jurisdiction, removal of the case before it was appropriate under the All Writs Act. *Id.*, 195 F.3d at 427. In so holding, the Eighth Circuit relied on its previous rulings in *NAACP I* and *NAACP II*.

There, the Eighth Circuit had recognized that the district court was confronted with a situation where parties subject to the district court's continuing jurisdiction under the consent decree in a previous case were resorting to a state forum to relitigate settled and released claims. "Faced with this circumstance, we believe the district court was warranted in authorizing removal from state court under the All Writs Act to protect the integrity of the federal consent decree [previously] entered. . . ." 125 F.3d at 1173.

The Sixth Circuit, in *Sable*, was presented with a district court's ruling denying a plaintiff's motion to remand a case removed from Michigan state court to the Eastern District of Michigan. In an earlier case, the United States had sued the plaintiff in federal court to recover some of the investigation costs incurred by the Environmental Protection Agency in conducting a Remedial Investigation and Feasibility Study of property owned by the plaintiff and used as an industrial waste landfill site. The parties settled and entered into a consent agreement involving a cash payment to the EPA for its cleanup efforts and the granting to the EPA of access to the site. The consent agreement also imposed deed restrictions that severely limited access to and use of the site.

In separate consent agreements, the defendants in *Sable* had agreed to pay a significant sum to design and implement a system to contain the chemicals on the site. The agreement contained the same deed restrictions.

In the state court suit, plaintiff sought damages for defendants' breach of their duty to remove all contaminants dumped in the site as well as damages for loss of the use of the land resulting from the deed restrictions. The federal district court denied plaintiff's motion to remand the case to the Michigan state court whence it came.

Affirming the trial court's judgment, the Sixth Circuit concluded, among other things, that the district court's decision to keep plaintiff's case in federal court to protect the EPA-negotiated consent agreements "is supported by the Court's powers under the All Writs Act. . . ." *Sable*, 90 F.3d at 175. In support of its conclusion, the Sixth Circuit quoted from this Court's opinion in *United States v. New York Tel. Co.*, 434 U.S. 159 (1977). It explained that this Court has " 'repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued. . . .' " 90 F.3d at 175 (quoting *New York Telephone*, 434 U.S. at 172). Further, " '[t]he power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice. . . .' " *Id.* (quoting *New York Telephone*, 434 U.S. at 174).

Determining that the plaintiff's requested relief would seriously interfere with provisions in the consent agreements, the Sixth Circuit concluded that the district court "was well within its discretion" in denying the motion to remand, "for it had power under the All Writs Act to protect the federal consent agreements from conflicting state orders." *Id.*

Later, in *Bylinski*, the Sixth Circuit reaffirmed the principle that the All Writs Act gives federal courts the authority to remove an otherwise unremovable state court case to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained. *Id.*, 169 F.3d at 1003.

The Second Circuit, in a decision that conflicts with that of the Eleventh Circuit in this case, has approved of removal under the All Writs Act. *In re Agent Orange Prods. Liab. Litig.* involved suits brought by two groups of veterans and their family members who filed class action suits in state court seeking damages from seven chemical companies that manufactured the defoliant Agent Orange. The defendants removed the cases to federal court, and the Judicial Panel on Multidistrict Litigation transferred the cases to the Eastern District of New York. It did so because the Eastern District of New York had presided over hundreds of consolidated cases involving injuries alleged to have been caused by exposure to Agent Orange. It had certified class actions and presided over a class-wide settlement that, among other things, barred class members from instituting or maintaining an action against the defendants based on Agent Orange exposure.

The Eastern District of New York, which had maintained ongoing supervision of the payment of claims in accordance with the settlement agreement, denied the plaintiffs' motion to remand and dismissed the suits as barred by the previous settlement. Relying on *New York Telephone*, the Second Circuit concluded that removal was an appropriate use of federal judicial power under the All Writs Act. *Agent Orange*, 996 F.2d at 1431. Given what it referred to as the "exceptional circumstances" surrounding the case, exercising jurisdiction

over the removed cases "was a proper exercise of judicial discretion." *Id.* The district court was "not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings." *Id.* Rather, it was "enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction." *Id.*

While declining to exercise jurisdiction under the All Writs Act in *Davis*, the Third Circuit accepted the Second Circuit's teachings in *Agent Orange*. Citing *New York Telephone*, it noted that a federal district court, in exceptional circumstances, may use its authority under the All Writs Act to remove an otherwise unremovable state court action to prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained. *Davis*, 107 F.3d at 1047 n.4. The Third Circuit concluded that the defendants had not demonstrated how removal would support jurisdiction that is already in existence, and they failed to identify the "extraordinary circumstances" necessary to justify removal under the Act. *Id.* Given that the court recognized the authority of the federal district courts to exercise jurisdiction at all, the Third Circuit's governing law conflicts with that expressed by the Eleventh Circuit here.

The Eleventh Circuit's ruling here also runs counter to the law of the Seventh Circuit. In *VMS Securities Litigation*, the court concluded that where the district court had retained jurisdiction over previous actions, it could properly remove a subsequently-filed state court suit under the All Writs Act. *Id.*, 103 F.3d at 1323. The Seventh Circuit, too, relied on *New York Telephone*, which it described as this Court's

championing of a federal court's power to use the Act to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained. *Id.* Applying what it characterized as "the Second Circuit's sound reasoning from *Agent Orange*," the Seventh Circuit concluded that allowing the plaintiffs to maintain separate actions in state court would have a substantial "deleterious effect" on the previously-entered settlement mechanisms. *Id.*, 103 F.3d at 1324. In the Seventh Circuit's view, the "exceptional circumstances" warranted "this proper exercise of judicial discretion." *Id.*

The Tenth Circuit, with whom the Eleventh Circuit has allied itself, encountered, in *Hillman*, a situation "strikingly similar" to the one presented to the Second Circuit in *Agent Orange*. *Hillman*, 115 F.3d at 1468. What was not strikingly similar was the court's conclusion. The Tenth Circuit concluded that the district court had erred in relying on the All Writs Act in assuming jurisdiction over a state court suit even though that suit involved a common nucleus of facts and raised claims similar to those previously settled in the multidistrict litigation. While it recognized that the district court "was simply attempting to guard the integrity of its prior rulings in the multidistrict litigation," the Tenth Circuit concluded that interpreting the All Writs Act as a basis for federal jurisdiction in extraordinary circumstances was foreclosed by its earlier decision in *Commercial Sec. Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352 (CA10 1972). There, it had held that the All Writs Act does not operate to confer jurisdiction and that the Act does not allow a court to acquire jurisdiction over an individual or property not otherwise subject to its jurisdiction. *Id.* at 1355. Because it concluded that the district court did not have jurisdiction, the Tenth Circuit reversed and remanded the case to the district court with directions to remand to the state court.

Indicating just how contentious this issue has remained, one judge on the *Hillman* panel expressly disagreed that the Tenth Circuit's precedents required it to construe the All Writs Act so narrowly. "In my view, a district court retains authority to remove an otherwise unremovable state-court case to federal court in appropriate and narrow circumstances in aid of its jurisdiction." *Id.*, 115 F.3d at 1470 (Kelly, J., concurring in result). Judge Kelly thought the majority's result to be at odds with *New York Telephone*. *Id.*

Most recently, the Fifth Circuit, in *Real Parties in Interest*, held that the district court had erred in exercising its jurisdiction under the All Writs Act and in denying the plaintiff's motion to remand. *Id.* 259 F.3d at 395. It stopped short of determining whether, under extraordinary circumstances, such a case may be removed under the All Writs Act. "In the absence of such extraordinary circumstances, however, that indisputably *demand* such a course of action as absolutely necessary to vouchsafe the central integrity of the federal court judgment, we hold that the All Writs Act cannot be employed as a vehicle for removal." *Id.*

The court, however, left little doubt as to its inclination, characterizing as a "remote proposition" whether removal can be proper under the All Writs Act even in the face of extraordinary circumstances. *Id.* at 394. The Fifth Circuit also expressed reservation that the principle that an otherwise non-removable action becomes removable under the All Writs Act could remain valid in light of this Court's decision in *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998). "With *Rivet* standing as sentry, it would be bold indeed to read the All Writs Act as authorizing removal of an otherwise unremovable action." 259 F.3d at 393-94.

Interestingly, after this Court issued its opinion in *Rivet*, it issued a GVR order in *Nat'l Ass'n for the Advancement of Colored People v. Metro. Council*, 522 U.S. 1145 (1998). On reconsideration, the Eighth Circuit reinstated its previous opinion, concluding that *Rivet* did not compel a contrary result, *see Nat'l Ass'n for the Advancement of Colored People v. Metro. Council*, 144 F.3d 1168 (CA8 1998), and this Court thereafter denied review of the Eighth Circuit's subsequent ruling. *See Nat'l Ass'n for the Advancement of Colored People v. Metro. Council*, 525 U.S. 826 (1998).

Having percolated its way through still another Circuit, the issue is before the Court again today for resolution. The Eleventh Circuit's ruling directly conflicts with decisions of four other Circuits, and the Court should grant certiorari to review this important conflict.

II. The Question Presented is Important

The importance of the question presented is neatly encapsulated by Judge Kelly's observation in *Hillman* that the Tenth Circuit's reasoning (and by extension, that of the Eleventh Circuit in this case) "deprives the district courts of an important tool for vindicating their orders in exceptional cases. . . ." *Id.*, 115 F.3d at 1471. Indeed, Syngenta believes the Eleventh Circuit's ruling further exacerbates an intolerable schism. In some Circuits, diehard litigants may, willy-nilly, file suits in state court that thwart the integrity of the federal courts' consent decrees, settlement agreements, and ongoing supervision of other complex cases. At the same time, in other Circuits, the district courts are empowered to exercise removal jurisdiction to stop the state cases in their tracks.

While Syngenta does not presume to assert standing on behalf of the district courts to protect and effectuate their judgments, it *does* assert the right to go about its business in peaceful reliance upon the terms of the nationwide class action settlement in *Price* without being compelled to defend against the same claims re-filed by recalcitrant plaintiffs, plaintiffs who successfully intervened in the *Price* suit, agreed to the settlement terms, and reaped the benefits of that settlement.

This case presents the Court with an opportunity to address the reach of the All Writs Act and to harmonize the widening Circuit split. Consequently, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY B. ALSOBROOK, JR.
Counsel of Record
MARK C. SURPRENANT
ROBERT N. MARKLE
VALERIA M. SERCOVICH
ADAMS AND REESE LLP
Attorneys for Petitioners
4500 One Shell Square
New Orleans, Louisiana 70139
(504) 581-3234

APPENDIX

APPENDIX A — PER CURIAM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED AUGUST 14, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-6021
D. C. Docket No. 98-01150-CV-CB

HURLEY HENSON,

Plaintiff-Appellant,

versus

CIBA-GEIGY CORPORATION,
ROBERT RAAB, et al.,

Defendants-Appellees.

No. 99-6130
D. C. Docket No. 94-00647-CV-CB-S

RUSSELL PRICE, et al., on behalf of themselves
and others similarly,

Plaintiffs-Appellants,

Appendix A

HURLEY HENSON,

Movant-Appellant,

versus

CIBA-GEIGY CORPORATION, a corporation,

Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Alabama

(August 14, 2001)

Before EDMONDSON, CARNES and COX, Circuit Judges.

PER CURIAM:

These consolidated appeals arise from two actions, both of which originally asserted various tort claims arising from Ciba-Geigy Corporation's manufacture and sale of a chlorodimeform-based insecticide, Galecron. The principal issue presented is whether the district court had removal jurisdiction under 28 U.S.C. § 1441 and the All Writs Act, 28 U.S.C. § 1651, over a later action solely because prosecuting that action violated a settlement stipulation in an earlier action already before the court. We hold that it did not.

Appendix A

Background

The first of the two actions, *Price v. Ciba-Geigy Corp.*, was originally filed in the circuit court of Mobile County, Alabama. The defendants later removed it to the Southern District of Alabama, which certified a nationwide class and approved a complicated, structured settlement. The second, *Henson v. Ciba-Geigy Corp.*, originated in state district court in Iberville Parish, Louisiana. The Louisiana court stayed *Henson* after its named plaintiff and others successfully intervened in *Price* (where they were called the Henson interveners) and participated in the *Price* settlement. The settlement stipulation in the *Price* action had a clause requiring *Henson*'s dismissal:

> CLASS COUNSEL hereby stipulates that the RELATED CASE, including any and all claims (including, without limitation any CLAIMS defined herein) against CIBA GEIGY CORPORATION and individual defendants . . . shall be dismissed, with prejudice, as of the APPROVAL DATE.

(R.7-84-Ex. A at 18.) "Related case" means, according to the stipulation, "*Hurley Henson, et al v. Ciba-Geigy Corporation, et al* / Docket No. 43,620, 18th Judicial District Court, Parish of Iberville, State of Louisiana." (*Id.* at 15.)

Following the approval of the *Price* settlement, "class counsel" (lawyers for the original *Price* plaintiffs) complied with the stipulation and prompted the Louisiana state district court to enter an order to show cause why the action should

not be dismissed because of the stipulation. A hearing before the Louisiana district court ensued. Hany Zohdy, a Louisiana lawyer who represented the Henson interveners in the *Price* proceedings, told the Louisiana court that the *Price* settlement required dismissal only of claims concerning chlorodimeform and not claims about other chemicals handled by Ciba-Geigy. That was incorrect, of course, because the settlement stipulation plainly named the entire *Henson* action by docket number and said nothing about dismissing only certain claims.[1] Zohdy's representation nonetheless successfully misled the Louisiana court into inviting the Henson plaintiffs to amend their petition to assert tort claims arising from exposure to Atrazine, another toxic Ciba-Geigy product.

This amendment prompted Ciba-Geigy (and three individual defendants, all diversity-defeating Louisiana residents, who were also named in *Henson*) to remove the action to the Middle District of Louisiana under 28 U.S.C. § 1441(a), asserting federal jurisdiction based on the All Writs Act, 28 U.S.C. § 1651.[2] The defendants immediately requested a transfer to the Southern District of Alabama under 28 U.S.C. § 1404(a), which was granted. Following the transfer, the Southern District dismissed *Henson* as barred

1. In an earlier motion filed before the same Louisiana court, Zohdy had explained that "the definition of 'Related Case' found in the Stipulation of Settlement is without doubt an unambiguous reference to the instant case." (Mem. Supp. Mot. Lift Stay at 2.)

2. In addition to the lack of complete diversity, Ciba-Geigy could not have removed by asserting jurisdiction under 28 U.S.C. § 1332 because the notice of removal was filed more than one year after the action's commencement. *See* 28 U.S.C. § 1446(b).

by the *Price* settlement. Exercising jurisdiction in the *Price* action itself, moreover, the Southern District ordered Zohdy to pay about $27,000 to Ciba-Geigy for the legal fees it incurred in enforcing the *Price* settlement despite Zohdy's efforts to thwart it. These are the rulings that the *Henson* plaintiffs and Zohdy appeal.

Whether the district court had removal jurisdiction is a question we review de novo. *Singleton v. Apfel*, 231 F.3d 853, 856 (11th Cir. 2000). "We review the district court's construction of the [settlement stipulation] de novo." *Waters v. Int'l Precious Metals Corp.*, 237 F.3d 1273, 1277 (11th Cir. 2001). Whether the district court properly imposed sanctions for violation of a court-adopted stipulation of settlement we review for abuse of discretion only. *See Abbott Labs. v. Unlimited Beverages, Inc.*, 218 F.3d 1238, 1240 (11th Cir. 2000).

Discussion

Sanctions on Zohdy

Zohdy challenges the sanctions order on three meritless grounds. First, he says, the district court lacked jurisdiction to sanction him. Not so, because he was counsel of record in *Price*, the action in which he signed the settlement stipulation and in which he was sanctioned for violating the settlement. *See Levine v. Comcoa Ltd.*, 70 F.3d 1191, 1192 (11th Cir. 1995). Second, Zohdy argues, the settlement stipulation did not require dismissal of claims relating to Atrazine, and he therefore did not act contrary to the settlement. This contention is meritless; the stipulation language quoted above

explicitly requires dismissal of *all* claims in the *Henson* action, which the stipulation identifies by docket number. Finally, Zohdy asserts that *he* had no obligation to dismiss the *Henson* action because the settlement stipulation puts that onus on "class counsel," who do not include him. Perhaps that is so, but the district court sanctioned Zohdy, a signatory of the stipulation of settlement, for his efforts to undermine the settlement by preventing class counsel from discharging their duties to secure *Henson*'s dismissal. Whether or not Zohdy was specifically responsible for getting *Henson* dismissed, it was within the court's power to effectuate its orders to punish Zohdy for interfering with the settlement's implementation. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45, 111 S. Ct. 2123, 2133 (1991) (court has inherent power to assess attorney fees on counsel for willful contravention of court order).

Removal Jurisdiction Over Henson

Zohdy's challenge to the district court's subject-matter jurisdiction over *Henson* has more merit. The asserted jurisdictional basis is the All Writs Act, whose pertinent part provides district courts the power to protect their jurisdiction: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Thus, for example, a district court has the authority under the Act to enjoin a party to litigation before it from prosecuting an action in contravention of a settlement agreement over which the district court has retained jurisdiction. *See In re VMS Secs. Litig.*, 103 F.3d 1317, 1324 (7th Cir. 1996); *White v. Nat'l*

Football League, 41 F.3d 402, 409 (9th Cir. 1994); *Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir. 1993); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067, 1069 (11th Cir. 1993). Whether a district court also has jurisdiction under the All Writs Act over an action removed under § 1441 is a question that is currently unanswered in this circuit.[3]

---

3. We have come close. *Pacheco de Perez v. AT & T Co.*, 139 F.3d 1368, 1379 (11th Cir. 1998), concluded that even if All Writs Act removal jurisdiction existed in "exceptional circumstances," the circumstances in that case were not exceptional enough — only the preclusive effect of a federal judgment was at issue. *Id.* And in one of the 2000 presidential election actions, this court found a federal question, but did not "rule out other bases that federal jurisdiction might exist" over a removed action and cited other circuits' cases about the All Writs Act. *Harris v. Fla. Elections Comm'n*, 235 F.3d 578, 580 n.3 (11th Cir. 2000).

The issue is, by contrast, unavoidably presented here. First, there is no other possible ground of federal subject-matter jurisdiction. Ciba-Geigy's removal notice also alleged supplemental jurisdiction, by virtue of *Price*, under 28 U.S.C. § 1367. But § 1367 cannot provide the "original jurisdiction" that § 1441 demands for an action to be removable. *Ahearn v. Charter Township*, 100 F.3d 451, 456 (6th Cir. 1996). Ciba-Geigy did not, furthermore, assert ancillary jurisdiction, if such jurisdiction exists independent of § 1367 (*see Peacock v. Thomas*, 516 U.S. 349, 116 S. Ct. 862 (1996)), and we therefore do not address it as a potential basis. Second, the circumstances here fit the definition of "exceptional" that other circuits' cases imply, since a signatory to a federal settlement stipulation sought to sabotage it. *Cf. In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1430-31 (2d Cir. 1993) (absent class members sought to relitigate the settled action, in violation of a release in the settlement).

The circuits have split in addressing similar questions of federal courts' power under the All Writs Act to protect judgments and control diehard litigants. On one hand, most have read the All Writs Act generously. Presented with statutory removal questions nearly identical to the one posed here, the Sixth and Eighth Circuits have held that state-court actions that could produce judgments undermining federal consent orders — and in one case a state-court action that was merely barred by the preclusive effect of a federal consent decree — are removable under § 1441, with original subject-matter jurisdiction supplied by the All Writs Act. *See Xiong v. State of Minn.*, 195 F.3d 424, 426 (8th Cir. 1999); *Bylinski v. City of Allen Park*, 169 F.3d 1001, 1003 (6th Cir. 1999); *N.A.A.C.P., Minneapolis Branch v. Metro. Council*, 125 F.3d 1171, 1174 (8th Cir. 1997) (removal simply to determine preclusive effect of the federal consent decree), *cert. granted; summarily vacated and remanded for reconsideration in light of Rivet v. Regions Bank*, 522 U.S. 470, 118 S. Ct. 921 (1998), 522 U.S. 1145, 118 S. Ct. 1162 (1998), *reinstated*, 144 F.3d 1168, 1169 (1998); *Sable v. Gen. Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996). The Second Circuit has not yet gone that far, but it has repeatedly held that a district court may, on motion of parties to an action over which it has jurisdiction, order a common-law removal (distinct from that authorized by 28 U.S.C. § 1441(a) or other removal statutes) to federal court of a state-court action, even if there is no other basis of federal subject-matter jurisdiction, when the prosecution of the state-court action threatens the integrity of a consent decree or judgment entered in the federal action. *See In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1431 (2d Cir. 1993); *United States v. City of N.Y.*, 972 F.2d 464, 469 (2d Cir. 1992); *Yonkers Racing Corp. v. City of*

Yonkers, 858 F.2d 855, 855 (2d Cir. 1988); *see also United States v. Am. Soc'y of Composers, Authors, & Publishers*, 32 F.3d 727, 731 (2d Cir. 1994) (All Writs Act provides independent ground of federal subject-matter jurisdiction of motion to vacate an arbitral award, when the parties arbitrated according to the terms of a preexisting federal consent decree). The Seventh Circuit has agreed with the Second Circuit, possibly in dicta (while the procedural history is not completely clear from the opinion, it appears that the district court enjoined the state-court actions rather than deeming them "removed"). *In re VMS Secs. Litig.*, 103 F.3d at 1324. The Third Circuit has also embraced the Second Circuit rule, although it declined to find appellate jurisdiction under the All Writs Act to review the district court's refusal to exercise removal jurisdiction under the Act. *Davis v. Glanton*, 107 F.3d 1044, 1047 n.4 (3d Cir. 1997).

On the other hand are the minority of courts that have taken a less expansive view. The Tenth Circuit has held that the All Writs Act does not furnish removal jurisdiction at all because it confers no independent jurisdiction. *See Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir. 1997). A Ninth Circuit opinion could be read to reach a similar conclusion. *See Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 937 (9th Cir. 1993) (state-court action alleging breach of the agreement that led to a federal court's consent protective order was not removable, both because it did not concern the interpretation of the protective order itself and because the All Writs Act "may be invoked by a district court only in aid of jurisdiction which it already has"). Some academic opinion tends to reject the expansive view of the All Writs Act preferred by the Second, Sixth, and Eighth

Circuits. *See* Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U.L. Rev. 773 (2000); Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. Pa. L. Rev. 401 (1999).

We tend toward the Tenth Circuit camp and conclude that the district court lacked removal jurisdiction over the *Henson* case. Two settled principles, one about the prerequisites of § 1441 removal, and another about the All Writs Act, lead us to this conclusion. First, § 1441(a) authorizes removal only of actions "of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). That phrase means that actions are not removable unless they "originally could have been filed in federal court." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429 (1987). The implication of that rule here is that removal is proper only if the All Writs Act could have furnished subject-matter jurisdiction over the *Henson* action if it had first been filed in federal court. And, second, the Act does not provide such jurisdiction. The All Writs Act authorizes writs "in aid of [the courts'] respective jurisdictions," and thus does not provide an independent basis of federal subject-matter jurisdiction; a plaintiff cannot sue invoking only the court's All Writs power. *Clinton v. Goldsmith*, 119 S. Ct. 1538, 1542 (1999); *see Pa. Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 40, 106 S. Ct. 355, 360 (1985) (Act authorizes orders protecting the jurisdiction that a federal court has "otherwise acquired"); *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 504 (1813) (no jurisdiction under contemporary All Writs Act over action seeking writ of mandamus against Ohio official based on federal law); *see generally* Hoffman, *supra*, at 433-39 (history

of All Writs Act strongly implies that it is not an independent source of subject-matter jurisdiction). Section 1441 and the All Writs Act do not, therefore, together provide a right to remove actions such as *Henson*.

The most troubling counterargument, and the one that the Second, Sixth, and Eighth Circuits ultimately rely on, is that the All Writs Act is jurisdictional caulk — it plugs the cracks in federal jurisdiction through which crafty litigants can escape the effect of a federal order. *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172-73, 98 S. Ct. 364, 372 (1977) (articulating this broad view of the All Writs Act's purpose). Therefore, the argument goes, the Act authorizes any exercise of authority that is convenient for effectuating a federal judgment, including the exercise of removal jurisdiction over a different action whose prosecution is inconsistent with a federal judgment. *See, e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d at 1431. This reasoning is tempting in a case like ours, but it goes too far. Too elastic an interpretation of the All Writs Act perverts it from a tool for effectuating Congress's intent in conferring jurisdiction on the lower federal courts into a device for judicially re-equilibrating a state-federal balance that is Congress's to strike. By requiring complete diversity in § 1332, and by limiting the time for removal of diversity cases to one year after their commencement, Congress has decided that *Henson* does not belong in federal court. The All Writs Act, even as jurisdictional caulk, should not allow us to override Congress's decision unless no other reasonable way appears to ensure that the federal court's orders are heeded. *See Clinton*, 119 S. Ct. at 1543. The district court did not need to exercise jurisdiction over *Henson* when it had the ready remedy of an injunction

Appendix A

against prosecution of the action, properly issued under the All Writs Act.

All things considered, we conclude that the district court lacked subject-matter jurisdiction over the *Henson* action.

Conclusion

We accordingly vacate the district court's order dismissing *Henson* and remand with instructions for the court to remand *Henson* to Louisiana state court. We do not, however, imply that the district court may not by injunction force *Henson*'s dismissal. We affirm the district court's award of sanctions against Zohdy.

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-6021
D. C. Docket No. 98-01150-CV-CB

HURLEY HENSON,

Plaintiff-Appellant,

versus

CIBA-GEIGY CORPORATION,
ROBERT RAAB, et al.,

Defendants-Appellees.

No. 99-6130
D. C. Docket No. 94-00647-CV-CB-S

RUSSELL PRICE, et al., on behalf of themselves
and others similarily,

Plaintiffs-Appellants,

HURLEY HENSON,

Movant-Appellant,

versus

CIBA-GEIGY CORPORATION, a corporation,

Defendant-Appellee.

Appendix A

Appeals from the United States District Court
for the Southern District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 14, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION IN *PRICE, et al. v. CIBA-GEIGY CORPORATION* DATED AND FILED NOVEMBER 24, 1998

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

CIVIL ACTION NO. 94-0647-CB-S

RUSSELL PRICE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

CIBA-GEIGY CORPORATION,

Defendant.

ORDER

This matter is before the Court on motions by Class Counsel (Doc. 152) and Defendant Ciba-Geigy (Doc. 155) For Sanctions, To Enforce Settlement Agreement, and to Have Hany A. Zohdy Held in Contempt. In their motions, Class Counsel and Ciba-Geigy also requested this Court to enjoin proceedings in *Hurley Henson, et al. v. Ciba-Geigy Corp., et al.*, No. 43,620, Div. "D" 18th Judicial District Court,

Parish of Iberville, State of Louisiana, then pending in Louisiana State court.[1]

It is clear to this Court that, under the terms of the Stipulation of Settlement in *Price, et al. v. Ciba-Geigy*, the plaintiffs in *Henson*, referred to as the "Henson Group" were required to dismiss the state court action with prejudice as of the approval date of the Stipulation of Settlement. Rather than obey this Court's clear and unambiguous order, the "Henson Group" and their counsel, Hany A. Zohdy, attempted to thwart this Court's jurisdiction by filing an amended complaint in *Henson* in which they put forward claims which they say do not fall within the ambit of the Stipulation of Settlement.

However, the Stipulation of Settlement clearly states that *any and all claims* in the Related Case (*Henson*) shall be dismissed with prejudice. This Court can discern no subtlety in its Order and therefore, the Court finds that Hany A. Zohdy has acted in a manner calculated to offend this Court and in complete defiance of the Court's Order.

This Court ordered Zohdy to show cause why *he* should not be sanctioned for his defiance (Doc. 153). Zohdy responded only that the *Henson* case should not be the subject of an injunction from this Court and, aside from plaintive calls not to sanction his client, did not address the issue of sanctions to be imposed upon him. For these reasons, it is hereby **ORDERED** that the terms of the Stipulation of

1. *Henson, et al. v. Ciba-Geigy, et al.* has since been removed to Federal court and was transferred to this Court. The case is now identified as 98-1150-CB-S.

Settlement be enforced and *Hurley Henson, et al. v. Ciba-Geigy Corp., et al.*, 98-1150-CB-S (S.D. Ala.) be and hereby is **DISMISSED with PREJUDICE**. Additionally, it is hereby **ORDERED** that Hany A. Zohdy pay all costs incurred by the *Hurley* defendants subsequent to the Approval Date for the *Price* Stipulation of Settlement, August 26, 1994. The *Hurley* Defendants are hereby instructed to file a statement reflecting their reasonable costs in defending this case after August 26, 1994 with this Court no later than December 22, 1998.

DONE this the 24th day of November, 1998.

s/ Charles R. Butler, Jr.
CHIEF DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION IN *HENSON, et al. v. CIBA-GEIGY CORPORATION, et al.* DATED AND FILED NOVEMBER 24, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION NO. 98-1150-CB-S

HURLEY HENSON, *et al.*,

Plaintiffs,

v.

CIBA-GEIGY CORPORATION, *et al.*,

Defendant.

ORDER

Pursuant to the Order entered this day in *Price, et al. v. Ciba-Geigy*, 94-00647-CB-S (S.D. Ala.) it is hereby **ORDERED, ADJUDGED, and DECREED** that all claims by Plaintiffs, the "Henson Group" be and hereby are **DISMISSED with PREJUDICE**. Pursuant to the Order entered in *Price*, all costs incurred by Defendants here are to be taxed to Hany A. Zohdy, counsel for Plaintiffs, the "Henson Group".

DONE this the 24th day of November, 1998.

s/ Charles R. Butler, Jr.
CHIEF DISTRICT JUDGE

No. 01-757

FILED
DEC 27 2001
CLERK

In The

Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC., ROBERT RABB, EDEE TEMPLET, and KENNETH A. DEVUN,

Petitioners,

v.

HURLEY HENSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN SUPPORT ON BEHALF OF RESPONDENT

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

HANY A. ZOHDY
Of Counsel
Suite J
12090 South Harrell's Ferry Road
Baton Rouge, Louisiana 70816
(225) 293-5300

Attorneys for Respondent

QUESTION PRESENTED FOR REVIEW

Does the All Writs Act, 28 U.S.C. 1651(a), grant federal district courts the original jurisdiction required under 28 U.S.C. 1441 to permit removal of cases that would otherwise be ineligible for removal?

BRIEF IN SUPPORT ON BEHALF OF RESPONDENT

Respondent, Hurley Henson, respectfully submits this brief in support of the Petition in the above-captioned case. There is a manifest division in authority on whether federal district courts may employ the All Writs Act, 18 U.S.C. § 1651(a), as a basis for removal jurisdiction, in the absence of any other grounds for original jurisdiction. The split in the circuits is well-documented and notorious, and the underlying issue is of great importance to the operation of the federal courts. Respondent is prepared to fully defend the decision of the Eleventh Circuit, in alignment with three other Circuits, that such a use of the All Writs Act is manifestly improper.

COUNTER STATEMENT OF THE CASE

Petitioners provide an accurate account of the prior proceedings in this case, at least as relevant to the All Writs Act ruling of the Eleventh Circuit. Respondent would, however, dispute Petitioners' characterization of the events giving rise to the district court's award of sanctions against Attorney Hany Zohdy in this case. Despite the district court's ruling that Zohdy attempted to "thwart" the settlement agreement reached earlier in federal court by initiating an unrelated state proceeding, see Pet. App. 16a, it is by no means clear that that was, in fact, either his intention or purpose. Indeed, given that class counsel made no efforts to dismiss the *Henson* action and that Petitioners sought removal of the proceeding only four years after the ostensible settlement, is highly suggestive that neither side initially regarded the *Henson* proceeding as being wholly

barred by the settlement.

More significantly, it is doubtful that the district court, as affirmed by the Eleventh Circuit, had the jurisdiction to sanction Zohdy in this proceeding for violating an earlier settlement. This is especially so since Zohdy was not class counsel in the earlier proceeding and was not charged in the settlement stipulation with the duty of effectuating the agreement. See Pet. App. 5a-6a. Respondent intends to seek review, by way of a conditional Cross-Petition, of this aspect of the Eleventh Circuit's ruling. But, otherwise, Respondent concurs that the All Writs Act issue decided by the Eleventh Circuit merits this Court's plenary review.

REASONS FOR GRANTING THE PETITION

1. Respondent takes the exceptional step of supporting this Petition because it is manifest that there is a clear schism in circuit authority on the use of the All Writs Act, 28 U.S.C. § 1651(a), as a means to grant the federal courts removal jurisdiction where it otherwise would not exist. The specific context of this case is, of course, the propriety of district courts asserting jurisdiction in state-filed proceedings, in order to enforce settlement agreements previously entered into by federal courts. This appears to be the most common scenario in which federal courts are attempting to boot-strap their removal jurisdiction, but it is by no means the only one. See Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. REV. 773, 794-812 (2000); Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 408-32 (1999) (both collecting cases).

As the Eleventh Circuit acknowledged in the decision below, see Pet. App. 8a-10a, there is a cavernous split in the circuits on this question. Even after eliminating certain cases where the rulings are doubtful or are dicta,[1] that leaves a clear division in precedent, with four Circuits ruling that the All Writs Act provides the original jurisdiction needed for removal,[2] and three Circuits rejecting such a theory.[3] Indeed, since the Second Circuit initiated this "unconventional use" of the All Writs Act, see Hoffman, supra, at 415, with *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988); this divergence in practice among the federal courts of appeals has been widening, not closing.

2. Respondent certainly concurs with Petitioners that the

[1] In this category would be included a decision from the **Third** Circuit (*Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997), cert. denied, 522 U.S. 859 (1997) (holding that use of the All Writs Act in providing removal jurisdiction was permissible, although circumstances of the case did not justify it)); and the **Fifth** Circuit (*Texas v. Real Parties in Interest*, 259 F.3d 387, 395 (5th Cir. 2001) (same holding)).

[2] **Second** (*In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1431 (2d Cir. 1993)); **Sixth** (*Bylinski v. City of Allen Park*, 169 F.3d 1001, 1003 (6th Cir 1999)); *Sable v. Gen. Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996)); **Seventh** (*In re VMS Secs. Litig.*, 103 F.3d 1317, 1324 (7th Cir. 1996)); **Eighth** (*Xiong v. State of Minnesota*, 195 F.3d 424, 426 (8th Cir. 1999)).

[3] **Ninth** (*Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 937 (9th Cir. 1993)); **Tenth** (*Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir. 1997)); **Eleventh** (the underlying case in this Petition). It should be noted that an earlier decision of the **Seventh** Circuit, *In re County Collector*, 96 F.3d 890, 902-03 (7th Cir. 1996), appears to reject this use of the All Writs Act, although its vitality is questionable after the *In re VMS Secs. Litig.* decision.

issue raised here is important, within the meaning of this Court's considerations for the grant of certiorari in S.Ct. R. 10(a). See Pet. 14-15. Respondent would, however, submit that the Eleventh Circuit's decision — and those of the other courts of appeals that have rejected the extended application of the All Writs Act to inappropriately broaden removal jurisdiction — properly reflects this Court's jurisprudence and strikes the right balance between respecting the integrity of federal judgments, while, at the same time, preserving state-court jurisdiction from unauthorized removals.

This Court has consistently reiterated that removal under 28 U.S.C. § 1441 is only possible where a case "originally could have been filed in federal court." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Moreover, the All Writs Act's grant of authority "necessary or appropriate in aid [of federal court] jurisdiction[]," 28 U.S.C. § 1651(a), has never been regarded as an independent basis for federal subject-matter jurisdiction. The All Writs Act thus cannot, by itself, supply original jurisdiction where it does not otherwise exist. See *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999); *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 40 (1985).

These conclusions are all consistent with the history and purpose of the All Writs Act. No recourse to plumbing metaphors of the Act as "jurisdictional caulk . . . plug[ging] the cracks in federal jurisdiction," Pet. App. 11a (citing *United States v. New York Tel. Co.*, 434 U.S. 159, 172-73 (1977), for this "broad view" of the Act), will sanction what is otherwise an impermissibly wide expansion of federal jurisdiction at the expense of state courts. As the Eleventh Circuit observed, Pet. App. 11a, such a "re-equilibrating [of the] federal-state balance" is Congress's to make. Respondent looks forward to joining issue on these questions should the Court, in its wise exercise of jurisdiction, grant review here.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

HANY A. ZOHDY
Of Counsel
Suite J
12090 South Harrell's Ferry Road
Baton Rouge, Louisiana 70816
(225) 293-5300

Attorneys for Respondent

December 2001

Supreme Court U.S.
FILED
MAY 3 2002
OFFICE OF THE CLERK

No. 01-757

IN THE

Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC., ROBERT BABB, EDEE TEMPLET, and KENNETH A. DEVUN,

Petitioners,

v.

HURLEY HENSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

HENRY B. ALSOBROOK, JR.
Counsel of Record
MARK C. SURPRENANT
ROBERT N. MARKLE
VALERIA M. SERCOVICH
ADAMS AND REESE LLP
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

ALAN B. NADEL
Litigation Counsel
SYNGENTA CROP PROTECTION, INC.
P.O. Box 18300
Greensboro, NC 27419
(336) 632-6492

Attorneys for Petitioners

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322
(404) 727-6822

HANY A. ZOHDY
12090 South Harrell's Ferry Road
Suite J
Baton Rouge, LA 70816
(225) 293-5300

Attorneys for Respondent

PETITION FOR CERTIORARI FILED NOVEMBER 8, 2001
CERTIORARI GRANTED FEBRUARY 19, 2002

TABLE OF CONTENTS

Page

Appendix A — Relevant Docket Entries 1a

Appendix B — Per Curiam Opinion And Judgment Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed August 14, 2001 ..... 13a

Appendix C — Order Of The United States District Court For The Southern District Of Alabama, Southern Division In *Price, et al. v. Ciba-Geigy Corporation* Dated And Filed November 24, 1998 ..... 27a

Appendix D — Order Of The United States District Court For The Southern District Of Alabama, Southern Division In *Henson, et al. v. Ciba-Geigy Corporation, et al.* Dated And Filed November 24, 1998 ..... 31a

Appendix E — Stipulation Of Settlement Dated August 26, 1994 ..... 32a

Appendix F — Left Blank Intentionally 42a

Appendix G — Order Of The United States District Court For The Southern District Of Alabama, Southern Division Dated And Filed November 24, 1998 ..... 48a

Contents

Page

Appendix H — Stipulation Of Settlement Of The United States District Court For The Southern District Of Alabama Dated And Filed January 30, 1995 ..... 49a

Appendix I — Notice Or Removal In The United States District Court For The Middle District Of Louisiana Dated October 13, 1998 ..... 58a

Appendix J — Motion To Transfer In The United States District Court For The Middle District Of Louisiana Dated October 13, 1998 ..... 65a

Appendix K — Memorandum In Support Of Motion To Transfer In The United States District Court For The Middle District Of Louisiana Dated October 13, 1998 ..... 67a

Appendix L — Transcript Of The 18th Judicial District For Parish Of Iberville, State Of Louisiana Dated August 18, 1998 ..... 74a

Appendix M — Judgment Of The United States District Court For The Southern District Of Alabama, Southern Division Dated And Filed March 31, 1995 ..... 88a

Appendix N — Amendment To Plaintiffs'Original Class Action Petition Dated September 8, 1998 ..... 94a

APPENDIX A — RELEVANT DOCKET ENTRIES

1:98cv1150 Henson, et al v. Ciba-Geigy Corp., et al

11/13/98 14 Original file, certified copy of transfer order and docket sheet received from District of MD, LA (doc. 1-Ntc. of Removal; doc. 2- Ntc. of Filing Ntc. of Removal; doc. 3 - Ntc. of Docs. not filed in record see RED FOLDER WITH EXHIBITS; doc. 4- Certf. of Compliance, doc. 5-Ntc. of Docs. not filed in record-see RED FOLDER WITH EXHIBITS A and B, doc. 6-Mtn. to Transfer; doc. 7-Mem. in Support of Mtn. to Transfer; doc. 8-Order dated 10/15/98 setting sched. conf. and status rpt. ddl.; doc. 9-Mtn. and Mem. for Expedited Hrg.; doc. 10-Answer of Ciba-Geigy; doc. 11-Oppo. to Mtn. Transf; doc. 12-Order dated 11/4/98 setting exped. hrg. on 11/6/98; doc. 13-Order granting Mtn. to Transf. to SD, AL; doc. 14-Certif. copy of docket entries, transf. order and case file docs.) (jal) [Entry date 11/24/98] [Edit date 03/04/99]

* * *

11/24/98 16 Joint MOTION by Movants, Giba-Geigy, Robert Babb, Edee Templet, Keneth Devun and Class Counsel of Russell Price, et al to Dismiss ref. Judge Butler (jal) [Entry date 11/30/98]

11/24/98 17 ORDER granting [16-1] joint motion to Dismiss, pursuant to the order entered this date in 94-00647-CB-S it is ORDERED ALL CLMS. BY PLTF'S HENSON GROUP BE DISM.,

as set out (signed by Chief Judge Charles Butler Jr.), ME# 7194; JEOD 11/30/98, copies mailed (jal) [Entry date 11/30/98] (Edit date 01/07/99]

11/30/98 — Case closed (jal)

* * *

12/30/98 20 NOTICE OF APPEAL by Hurley Henson; appealing [17-1] Order Dismissing all clms. by Pltfs w/prej. pursuant to order entered in 94-00647-CB-S (Price) all costs incur. by Deft's are to be taxed to Hany Zody, "Henson Group", Fee Status: $150., #25928, Consent Form due 1/28/99 Appeal record due on 2/1/99 (jal) [Entry date 01/07/99] [Edit date 02/17/99]

* * *

10/28/99 21 ORDER OF USCA (certified copy) re: Appellee's Motion to Consolidate Appeal No. 99-6130 (94-00647) and 99-6021 (98-1150-CB-S) is GRANTED. (jal) [Entry date 11/03/99]

1:94cv647 Price, et al v. Ciba-Geigy

BEGIN VOL. 1

8/26/94 — CASE ASSIGNED to Mag. Judge William H. Steele (adk)

8/26/94 1 NOTICE OF REMOVAL filed with Amended Complaint; FILING FEE $ 120.00 RECEIPT # 12289 (adk)

* * *

8/29/94 6 MOTION by Ciba-Geigy to Conditionally Certify Class for purposes of settlement, and preliminarily approving the proposed settlement and direct class notice; referred to Judge Butler (lps) [Entry date 08/31/94]

8/29/94 7 MEMORANDUM by Ciba-Geigy in support of [6-1] motion to Conditionally Certify Class for purposes of settlement (lps) [Entry date 08/31/94]

8/29/94 8 JOINT MOTION by parties to establish an interim medical monitoring treatment and compensation program and to establish a mechanism to reimburse class counsel's fees and expenses; referred to Judge Butler (lps) [Entry date 08/31/94]

Appendix A

8/29/94 9 MEMORANDUM by Russell Price, Leslie E. Hoven, Jack H. Woodward, Grady W. Brown, Joe W. Bowman, Ciba-Geigy in support of [8-1] joint motion to establish an interim medical monitoring treatment and compensation program and to establish a mechanism to reimburse class coulsel's fees and expenses (lps) [Entry date 08/31/94]

8/29/94 — Motion(s) referred: [8-1] joint motion to establish an interim medical monitoring treatment and compensation program and to establish a mechanism to reimburse class counsel's fees and expenses referred to Chief Judge Charles R. Butler Jr., [6-1] motion to Conditionally Certify Class for purposes of settlement referred to Chief Judge Charles R. Butler Jr. (lps) [Entry date 08/31/94]

8/29/94 10 **FOLDER 1** ORDER granting [6-1] motion to Conditionally Certify Class for purposes of settlement; identifying terms set out in Settlement agreement and identifying class and approving notice to class set notice to class deadline for 12/16/94, set filing of papers in support of settlement deadline for 1/6/95, set Entry of Appearance by Settlement Class deadline for 12/16/94, set notice of intent to appear deadline for 12/16/94, set objections to settlement deadline for 1/6/95, set response to objections deadline for 1/6/95; fairness hearing of the Stipulation of Settlement is set for January 23, 1995 at 9:00 (signed by Chief Judge Charles R. Butler Jr.)

Appendix A

(STIPULATION, OF AGREEMENT IN RED FOLDER); certified copies mailed to counsel of record (lps) (Entry date 08/31/94] (Edit date 08/31/94]

8/29/94 11 **CONTINUE VOL. 1** ORDER granting [8-1] joint motion to establish an interim medical monitoring treatment and compensation program and to establish a mechanism to reimburse class counsel's fees and expenses as set out in the Stipulation of Settlement dated August 26, 1994; certified copies provided counsel on 8/29/94 (signed by Chief Judge Charles R. Butler Jr. on 8/29/94) (lps) [Entry date 08/31/94]

* * *

9/1/94 18 **FOLDER 2** ORDER granting [16-1] joint motion for an order directing class notice of the proposed settlement; parties are to provide class notice of the proposed settlement as set out in Exhibits A and B (Notice of Proposed Settlement of Class Action and Fairness Hearing; and Legal Notification Program for Galecron); order shall not preclude the parties for taking further steps to publicize settlement. Costs of providing this notice will be borne exclusively by defendant *(NOTE: EXHIBITS A AND B, as identified herein, are in RED FOLDER)*; certified copies furnished counsel (signed by Chief Judge Charles R. Butler Jr. on 9/1/94) (lps) [Entry date 09/02/94]

* * *

Appendix A

CONTINUE VOL. II

12/16/94 36 MOTION to Intervene by Hurley Henson (wet) [Entry date 12/30/94]

12/16/94 37 MEMORANDUM by Hurley Henson in support of [36-1] motion to Intervene by Hurley Henson; referred to Judge Butler (wet) [Entry date 12/30/94]

END VOL. II

* * *

BEGIN VOL. V

1/24/95 55 STIPULATION Ciba-Geigy and Class Counsel; referred to Judge Butler. (wet) [Entry date 01/25/95]

* * *

1/30/95 67 STIPULATION between class counsel, the Carpenter and Henson Groups, heretofore the Carpenter and Henson Objectors, and defendant, Ciba-Geigy Corporation, amending stipulation of settlement, filed in open court. (wet) [Entry date 02/07/95] **END VOL. V**

Appendix A

1/30/95 — **BEGIN VOL. XI ENVELOPE 1** Fairness hearing held this date by Judge Butler; attorneys' fee motions to be filed nlt 2/13/95 & reponses within 1 week thereafter; proposed FOF & COL to filed within 20 days. *(TRANSCRIPT IN RED FOLDER) (PLAINTIFF'S EXHIBITS IN ENVELOPE)* (wet) [Entry date 02/07/95] [Edit date 11/05/99] **END. VOL. XI**

* * *

CONTINUE VOL. VII

3/31/95 85 JUDGMENT entered in accordance with separate order entered 3/31/95 approving the parties Stipulation of Settlement and establishing the Findings of Fact and Conclusions of Law. Court shall retain jurisdiction with respect to future performance of, and any claims related to performance of, the settlement agreement and judgment; copies mailed 04/04/95; (signed by Chief Judge Charles R. Butler Jr.); J/E #4113 Judgment EOD: 04/04/95. (wet) [Entry date 04/04/95]

* * *

6/29/95 93 ORDER entered on joint motion as follows: ORDERED that the Court approves sum of $384,332.74 to be deducted from initial deposit to the DCA Fund & sum of $1,377,143.53 to be deducted from initial deposit to the MMT Fund pursuant to Paragraphs F of Exhibits "A" and "C" of the 8/26/94 stipulation of settlement.

Appendix A

Further ORDERED that sum of $29,615,667.26 be deposited into the DCA Fund & the sum of $3,622,856.47 be deposited into the MMT Fund pursuant to Exhibit "B" of the 8/26/94 stipulation of settlement. Further ORDERED that Ciba Geigy is to transfer said funds to the Administrator, State Mutual Life Assurance Company of America, by wire deposit to the Bankers Trust Company of New York, New York in accounts designated by the said State Mutual Life Assurance Company of America; copies mailed 7/6/95; (signed by Chief Judge Charles R. Butler Jr.) (wet) [Entry date 07/06/95]

* * *

CONTINUE VOL. VIII

6/6/96 113 ORDER granting [111-1] joint motion for order approving amendment to the stipulation of settlement (signed by Chief Judge Charles R. Butler Jr.) (adk) [Entry date 06/11/96]

6/6/96 122 STIPULATION of Settlement by Russell Price, Ciba-Geigy docketed pursuant to Order at Doc. 113 (mnp) (Entry date 09/19/96]

* * *

10/31/96 132 ORDER, referring to [128-1] motion for Approval of Stipulation is GRANTED and parties' Stipulation is APRPOVED (signed by Chief Judge Charles Butler Jr.) mailed 11/6/96 (sa) [Entry date 11/06/96]

* * *

Appendix A

9/25/98 151 MOTION by Russell Price, Leslie E. Hoven, Jack H. Woodward, Grady W. Brown, Joe W. Bowman, Alta Woodword, Jennie Ropp Brown, Martha Annie Bowman, Willie Gates, Garry Lynn Landrum for Sanctions and to enforce judgment/settlement agreement for injunctive relief and to have Hany A. Zohdy held in contempt; Ref. to J/Butler (mpp) [Entry date 09/30/98]

9/25/98 152 MEMORANDUM by Russell Price, Leslie E. Hoven, Jack H. Woodward, Grady W. Brown, Joe W. Bowman, Alta Woodword, Jennie Ropp Brown, Martha Annie Bowman, Willie Gates, Garry Lynn Landrum in support of [151-1] motion for Sanctions, [151-2] motion to enforce judgment/settlement agreement for injunctive relief; Ref. to J/Butler (mpp) (Entry date 10/01/98]

10/26/98 153 ORDER, set for Hany A. Zohdy to Show Cause Deadline for 11/13/98 as to Mtn. for Sanctions, the ptys to the state court action Response to Injunction agst state court when cont. despite the stlmt., set to 11/13/98 for (151-1] motion for Sanctions, as set out (signed by Chief Judge Charles Butler Jr.) copies mailed (jal) [Edit date 11/03/99] **END VOL. VIII**

11/13/98 154 **BEGIN VOL. IX** RESPONSE by Hurley Henson to [153-1] order set for Hany A. Zohdy to Show Cause Deadline for 11/13/98 as to Mtn. for Sanctions, and Reply

Appendix A

to [151-1] motion for Injunction and Sanctions, ref. Judge Butler (jal) (Entry date 11/16/98]

11/13/98 155 MEMORANDUM by Ciba-Geigy in support of [151-1] Class Counsel's motion for Sanctions, to enforce settlement agreement, for Injunctive relief and to have Hany Zohdy held in contempt, ref. Judge Butler (jal) [Entry date 11/16/98]

11/16/98 — Order 153 setting show cause to sanctions for Hany Zohdy, mailed to Jane C. Sachs, Esq., St. Joseph, MO, returned "not deliverable" (no forwarding address) (jal)

11/24/98 156 ORDER granting/enforce terms of [143-1] stipulation, it is ORDERED Hany A. Zohdy pay all costs incurred by the Hurley defts. subsequent to the Approval date for the Price Stipulation of stlmt. 8/26/94 set Hurley Deft's Motion Filing deadline to 12/22/98 reflecting costs as further sets out (signed by Chief Judge Charles Jr.) copies mailed (jal) [Entry date 11/25/98]

* * *

1/8/99 160 ORDER pursuant to Court's Order of 11/25/98 which deft's order to file stmtns of costs, as set out, it is ORDERED Hany Zohdy pay $27,183.79, set Zohdy deadline for 1/25/99, Clk. of Court disburse Adams & Reese ($14,042.82) and Kaye, Scholer, Fierman, Hays & Handler ($13,140.97), Clk. instr. to

Appendix A

notify Louisiana State Bar and Supreme Court of LA of Hany Zohdy sanctions, as set out, copies to all ptys, Louisiana State Bar and Supreme Court of LA, Financial Div. (signed by Chief Judge Charles Butler Jr.) (jal)

* * *

1/27/99 163 ORDER denying [161-1] motion for written reasons for jgm. denying [162-1] motion for Reconsideration of [160-1] order set Zohdy deadline for 1/25/99 (signed by Chief Judge Charles Butler Jr.); copies mailed (cmm)

1/28/99 — Note to docket: Order entered 1/26/99 revoking pro hac vice admissions for attorneys Hany A. Zohdy, Joe E. Thompson, Rolfe H. McCollister, and D. Rex English, ME #7328 (jlr) [Edit date 01/28/99]

* * *

2/10/99 166 NOTICE OF APPEAL by Hurley Henson; appealing [156-1] order , [160-1] order , [163-1] order Fee Status: $150.00 Receipt #26338 Appeal record due on 3/12/99 (eec) [Entry date 02/12/99]

2/10/99 167 MOTION by Hurley Henson to Stay Enforcement of Judgment Pending Appeal and to Set Appeal Bond or Substitute Bond With Security Interest Ref. to J/Butler 2/12/99 (eec) [Entry date 02/12/99]

* * *

Appendix A

2/12/99 Notice of appeal and certified copy of docket to USCA: [166-1] appeal by Hurley Henson Copies mailed to all counsel of record 2-12-99 (eec)

* * *

10/28/99 177 ORDER OF USCA (certified copy) as to Appellee's Motion to Consolidate Appeal No. 99-6130 (94-647-CB) with Appeal No. 99-6021 (98-1150-CB-S) is Granted. (jal) [Entry date 11/03/99]

11/8/99 178 ORDER granting [167-1] motion to Stay Enforcement of Judgment Pending Appeal and to Set Appeal Bond or Substitute Bond With Security Interest, the Court hereby sets the amt. of bond to $31,216, it is Ordered that the movant post bond by 12/6/99, upon posting of the bond the Jgm. entered on 1/8/99 will be stayed while appeal is taken, as set out (signed by Chief Judge Charles Butler Jr.) copies to all ptys, certf. to 11th Cir. (jal) [Entry date 11/09/99]

APPENDIX B — PER CURIAM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED AUGUST 14, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-6021
D. C. Docket No. 98-01150-CV-CB

HURLEY HENSON,

Plaintiff-Appellant,

versus

CIBA-GEIGY CORPORATION,
ROBERT BABB, et al.,

Defendants-Appellees.

No. 99-6130
D. C. Docket No. 94-00647-CV-CB-S

RUSSELL PRICE, et al., on behalf of themselves and others similarly,

Plaintiffs-Appellants,

Appendix B

HURLEY HENSON,

Movant-Appellant,

versus

CIBA-GEIGY CORPORATION, a corporation,

Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Alabama

(August 14, 2001)

Before EDMONDSON, CARNES and COX, Circuit Judges.

PER CURIAM:

These consolidated appeals arise from two actions, both of which originally asserted various tort claims arising from Ciba-Geigy Corporation's manufacture and sale of a chlorodimeform-based insecticide, Galecron. The principal issue presented is whether the district court had removal jurisdiction under 28 U.S.C. § 1441 and the All Writs Act, 28 U.S.C. § 1651, over a later action solely because prosecuting that action violated a settlement stipulation in an earlier action already before the court. We hold that it did not.

Appendix B

Background

The first of the two actions, *Price v. Ciba-Geigy Corp.*, was originally filed in the circuit court of Mobile County, Alabama. The defendants later removed it to the Southern District of Alabama, which certified a nationwide class and approved a complicated, structured settlement. The second, *Henson v. Ciba-Geigy Corp.*, originated in state district court in Iberville Parish, Louisiana. The Louisiana court stayed *Henson* after its named plaintiff and others successfully intervened in *Price* (where they were called the Henson interveners) and participated in the *Price* settlement. The settlement stipulation in the *Price* action had a clause requiring *Henson*'s dismissal:

> CLASS COUNSEL hereby stipulates that the RELATED CASE, including any and all claims (including, without limitation any CLAIMS defined herein) against CIBA GEIGY CORPORATION and individual defendants . . . shall be dismissed, with prejudice, as of the APPROVAL DATE.

(R.7-84-Ex. A at 18.) "Related case" means, according to the stipulation, "*Hurley Henson, et al v. Ciba-Geigy Corporation, et al* / Docket No. 43,620, 18th Judicial District Court, Parish of Iberville, State of Louisiana." (*Id.* at 15.)

Following the approval of the *Price* settlement, "class counsel" (lawyers for the original *Price* plaintiffs) complied with the stipulation and prompted the Louisiana state district court to enter an order to show cause why the action should

not be dismissed because of the stipulation. A hearing before the Louisiana district court ensued. Hany Zohdy, a Louisiana lawyer who represented the Henson interveners in the *Price* proceedings, told the Louisiana court that the *Price* settlement required dismissal only of claims concerning chlorodimeform and not claims about other chemicals handled by Ciba-Geigy. That was incorrect, of course, because the settlement stipulation plainly named the entire *Henson* action by docket number and said nothing about dismissing only certain claims.[1] Zohdy's representation nonetheless successfully misled the Louisiana court into inviting the Henson plaintiffs to amend their petition to assert tort claims arising from exposure to Atrazine, another toxic Ciba-Geigy product.

This amendment prompted Ciba-Geigy (and three individual defendants, all diversity-defeating Louisiana residents, who were also named in *Henson*) to remove the action to the Middle District of Louisiana under 28 U.S.C. § 1441(a), asserting federal jurisdiction based on the All Writs Act, 28 U.S.C. § 1651.[2] The defendants immediately requested a transfer to the Southern District of Alabama under 28 U.S.C. § 1404(a), which was granted. Following the transfer, the Southern District dismissed *Henson* as barred

1. In an earlier motion filed before the same Louisiana court, Zohdy had explained that "the definition of 'Related Case' found in the Stipulation of Settlement is without doubt an unambiguous reference to the instant case." (Mem. Supp. Mot. Lift Stay at 2.)

2. In addition to the lack of complete diversity, Ciba-Geigy could not have removed by asserting jurisdiction under 28 U.S.C. § 1332 because the notice of removal was filed more than one year after the action's commencement. *See* 28 U.S.C. § 1446(b).

by the *Price* settlement. Exercising jurisdiction in the *Price* action itself, moreover, the Southern District ordered Zohdy to pay about $27,000 to Ciba-Geigy for the legal fees it incurred in enforcing the *Price* settlement despite Zohdy's efforts to thwart it. These are the rulings that the *Henson* plaintiffs and Zohdy appeal.

Whether the district court had removal jurisdiction is a question we review de novo. *Singleton v. Apfel*, 231 F.3d 853, 856 (11th Cir. 2000). "We review the district court's construction of the [settlement stipulation] de novo." *Waters v. Int'l Precious Metals Corp.*, 237 F.3d 1273, 1277 (11th Cir. 2001). Whether the district court properly imposed sanctions for violation of a court-adopted stipulation of settlement we review for abuse of discretion only. *See Abbott Labs. v. Unlimited Beverages, Inc.*, 218 F.3d 1238, 1240 (11th Cir. 2000).

Discussion

Sanctions on Zohdy

Zohdy challenges the sanctions order on three meritless grounds. First, he says, the district court lacked jurisdiction to sanction him. Not so, because he was counsel of record in *Price*, the action in which he signed the settlement stipulation and in which he was sanctioned for violating the settlement. *See Levine v. Comcoa Ltd.*, 70 F.3d 1191, 1192 (11th Cir. 1995). Second, Zohdy argues, the settlement stipulation did not require dismissal of claims relating to Atrazine, and he therefore did not act contrary to the settlement. This contention is meritless; the stipulation language quoted above

explicitly requires dismissal of *all* claims in the *Henson* action, which the stipulation identifies by docket number. Finally, Zohdy asserts that *he* had no obligation to dismiss the *Henson* action because the settlement stipulation puts that onus on "class counsel," who do not include him. Perhaps that is so, but the district court sanctioned Zohdy, a signatory of the stipulation of settlement, for his efforts to undermine the settlement by preventing class counsel from discharging their duties to secure *Henson*'s dismissal. Whether or not Zohdy was specifically responsible for getting *Henson* dismissed, it was within the court's power to effectuate its orders to punish Zohdy for interfering with the settlement's implementation. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45, 111 S. Ct. 2123, 2133 (1991) (court has inherent power to assess attorney fees on counsel for willful contravention of court order).

Removal Jurisdiction Over Henson

Zohdy's challenge to the district court's subject-matter jurisdiction over *Henson* has more merit. The asserted jurisdictional basis is the All Writs Act, whose pertinent part provides district courts the power to protect their jurisdiction: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Thus, for example, a district court has the authority under the Act to enjoin a party to litigation before it from prosecuting an action in contravention of a settlement agreement over which the district court has retained jurisdiction. *See In re VMS Secs. Litig.*, 103 F.3d 1317, 1324 (7th Cir. 1996); *White v. Nat'l*

Football League, 41 F.3d 402, 409 (9th Cir. 1994); *Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir. 1993); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067, 1069 (11th Cir. 1993). Whether a district court also has jurisdiction under the All Writs Act over an action removed under § 1441 is a question that is currently unanswered in this circuit.[3]

---

3. We have come close. *Pacheco de Perez v. AT & T Co.*, 139 F.3d 1368, 1379 (11th Cir. 1998), concluded that even if All Writs Act removal jurisdiction existed in "exceptional circumstances," the circumstances in that case were not exceptional enough — only the preclusive effect of a federal judgment was at issue. *Id.* And in one of the 2000 presidential election actions, this court found a federal question, but did not "rule out other bases that federal jurisdiction might exist" over a removed action and cited other circuits' cases about the All Writs Act. *Harris v. Fla. Elections Comm'n*, 235 F.3d 578, 580 n.3 (11th Cir. 2000).

The issue is, by contrast, unavoidably presented here. First, there is no other possible ground of federal subject-matter jurisdiction. Ciba-Geigy's removal notice also alleged supplemental jurisdiction, by virtue of *Price*, under 28 U.S.C. § 1367. But § 1367 cannot provide the "original jurisdiction" that § 1441 demands for an action to be removable. *Ahearn v. Charter Township*, 100 F.3d 451, 456 (6th Cir. 1996). Ciba-Geigy did not, furthermore, assert ancillary jurisdiction, if such jurisdiction exists independent of § 1367 (*see Peacock v. Thomas*, 516 U.S. 349, 116 S. Ct. 862 (1996)), and we therefore do not address it as a potential basis. Second, the circumstances here fit the definition of "exceptional" that other circuits' cases imply, since a signatory to a federal settlement stipulation sought to sabotage it. *Cf. In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1430-31 (2d Cir. 1993) (absent class members sought to relitigate the settled action, in violation of a release in the settlement).

Appendix B

The circuits have split in addressing similar questions of federal courts' power under the All Writs Act to protect judgments and control diehard litigants. On one hand, most have read the All Writs Act generously. Presented with statutory removal questions nearly identical to the one posed here, the Sixth and Eighth Circuits have held that state-court actions that could produce judgments undermining federal consent orders — and in one case a state-court action that was merely barred by the preclusive effect of a federal consent decree — are removable under § 1441, with original subject-matter jurisdiction supplied by the All Writs Act. *See Xiong v. State of Minn.*, 195 F.3d 424, 426 (8th Cir. 1999); *Bylinski v. City of Allen Park*, 169 F.3d 1001, 1003 (6th Cir. 1999); *N.A.A.C.P., Minneapolis Branch v. Metro. Council*, 125 F.3d 1171, 1174 (8th Cir. 1997) (removal simply to determine preclusive effect of the federal consent decree), *cert. granted; summarily vacated and remanded for reconsideration in light of Rivet v. Regions Bank*, 522 U.S. 470, 118 S. Ct. 921 (1998), 522 U.S. 1145, 118 S. Ct. 1162 (1998), *reinstated*, 144 F.3d 1168, 1169 (1998); *Sable v. Gen. Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996). The Second Circuit has not yet gone that far, but it has repeatedly held that a district court may, on motion of parties to an action over which it has jurisdiction, order a common-law removal (distinct from that authorized by 28 U.S.C. § 1441(a) or other removal statutes) to federal court of a state-court action, even if there is no other basis of federal subject-matter jurisdiction, when the prosecution of the state-court action threatens the integrity of a consent decree or judgment entered in the federal action. *See In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1431 (2d Cir. 1993); *United States v. City of N.Y.*, 972 F.2d 464, 469 (2d Cir. 1992); *Yonkers Racing Corp. v. City of*

Appendix B

Yonkers, 858 F.2d 855, 855 (2d Cir. 1988); *see also United States v. Am. Soc'y of Composers, Authors, & Publishers*, 32 F.3d 727, 731 (2d Cir. 1994) (All Writs Act provides independent ground of federal subject-matter jurisdiction of motion to vacate an arbitral award, when the parties arbitrated according to the terms of a preexisting federal consent decree). The Seventh Circuit has agreed with the Second Circuit, possibly in dicta (while the procedural history is not completely clear from the opinion, it appears that the district court enjoined the state-court actions rather than deeming them "removed"). *In re VMS Secs. Litig.*, 103 F.3d at 1324. The Third Circuit has also embraced the Second Circuit rule, although it declined to find appellate jurisdiction under the All Writs Act to review the district court's refusal to exercise removal jurisdiction under the Act. *Davis v. Glanton*, 107 F.3d 1044, 1047 n.4 (3d Cir. 1997).

On the other hand are the minority of courts that have taken a less expansive view. The Tenth Circuit has held that the All Writs Act does not furnish removal jurisdiction at all because it confers no independent jurisdiction. *See Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir. 1997). A Ninth Circuit opinion could be read to reach a similar conclusion. *See Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 937 (9th Cir. 1993) (state-court action alleging breach of the agreement that led to a federal court's consent protective order was not removable, both because it did not concern the interpretation of the protective order itself and because the All Writs Act "may be invoked by a district court only in aid of jurisdiction which it already has"). Some academic opinion tends to reject the expansive view of the All Writs Act preferred by the Second, Sixth, and Eighth

Circuits. *See* Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U.L. Rev. 773 (2000); Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. Pa. L. Rev. 401 (1999).

We tend toward the Tenth Circuit camp and conclude that the district court lacked removal jurisdiction over the *Henson* case. Two settled principles, one about the prerequisites of § 1441 removal, and another about the All Writs Act, lead us to this conclusion. First, § 1441(a) authorizes removal only of actions "of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). That phrase means that actions are not removable unless they "originally could have been filed in federal court." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429 (1987). The implication of that rule here is that removal is proper only if the All Writs Act could have furnished subject-matter jurisdiction over the *Henson* action if it had first been filed in federal court. And, second, the Act does not provide such jurisdiction. The All Writs Act authorizes writs "in aid of [the courts'] respective jurisdictions," and thus does not provide an independent basis of federal subject-matter jurisdiction; a plaintiff cannot sue invoking only the court's All Writs power. *Clinton v. Goldsmith*, 119 S. Ct. 1538, 1542 (1999); *see Pa. Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 40, 106 S. Ct. 355, 360 (1985) (Act authorizes orders protecting the jurisdiction that a federal court has "otherwise acquired"); *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 504 (1813) (no jurisdiction under contemporary All Writs Act over action seeking writ of mandamus against Ohio official based on federal law); *see generally* Hoffman, *supra*, at 433-39 (history

of All Writs Act strongly implies that it is not an independent source of subject-matter jurisdiction). Section 1441 and the All Writs Act do not, therefore, together provide a right to remove actions such as *Henson*.

The most troubling counterargument, and the one that the Second, Sixth, and Eighth Circuits ultimately rely on, is that the All Writs Act is jurisdictional caulk — it plugs the cracks in federal jurisdiction through which crafty litigants can escape the effect of a federal order. *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172-73, 98 S. Ct. 364, 372 (1977) (articulating this broad view of the All Writs Act's purpose). Therefore, the argument goes, the Act authorizes any exercise of authority that is convenient for effectuating a federal judgment, including the exercise of removal jurisdiction over a different action whose prosecution is inconsistent with a federal judgment. *See, e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d at 1431. This reasoning is tempting in a case like ours, but it goes too far. Too elastic an interpretation of the All Writs Act perverts it from a tool for effectuating Congress's intent in conferring jurisdiction on the lower federal courts into a device for judicially re-equilibrating a state-federal balance that is Congress's to strike. By requiring complete diversity in § 1332, and by limiting the time for removal of diversity cases to one year after their commencement, Congress has decided that *Henson* does not belong in federal court. The All Writs Act, even as jurisdictional caulk, should not allow us to override Congress's decision unless no other reasonable way appears to ensure that the federal court's orders are heeded. *See Clinton*, 119 S. Ct. at 1543. The district court did not need to exercise jurisdiction over *Henson* when it had the ready remedy of an injunction

Appendix B

against prosecution of the action, properly issued under the All Writs Act.

All things considered, we conclude that the district court lacked subject-matter jurisdiction over the *Henson* action.

Conclusion

We accordingly vacate the district court's order dismissing *Henson* and remand with instructions for the court to remand *Henson* to Louisiana state court. We do not, however, imply that the district court may not by injunction force *Henson*'s dismissal. We affirm the district court's award of sanctions against Zohdy.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-6021
D. C. Docket No. 98-01150-CV-CB

HURLEY HENSON,

Plaintiff-Appellant,

versus

CIBA-GEIGY CORPORATION,
ROBERT BABB, et al.,

Defendants-Appellees.

No. 99-6130
D. C. Docket No. 94-00647-CV-CB-S

RUSSELL PRICE, et al., on behalf of themselves
and others similarily,

Plaintiffs-Appellants,

HURLEY HENSON,

Movant-Appellant,

versus

CIBA-GEIGY CORPORATION, a corporation,

Defendant-Appellee.

Appendix B

Appeals from the United States District Court
for the Southern District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 14, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION IN *PRICE, et al. v. CIBA-GEIGY CORPORATION* DATED AND FILED NOVEMBER 24, 1998

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

CIVIL ACTION NO. 94-0647-CB-S

RUSSELL PRICE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

CIBA-GEIGY CORPORATION,

Defendant.

ORDER

This matter is before the Court on motions by Class Counsel (Doc. 152) and Defendant Ciba-Geigy (Doc. 155) For Sanctions, To Enforce Settlement Agreement, and to Have Hany A. Zohdy Held in Contempt. In their motions, Class Counsel and Ciba-Geigy also requested this Court to enjoin proceedings in *Hurley Henson, et al. v. Ciba-Geigy Corp., et al.*, No. 43,620, Div. "D" 18th Judicial District Court,

Parish of Iberville, State of Louisiana, then pending in Louisiana State court.[1]

It is clear to this Court that, under the terms of the Stipulation of Settlement in *Price, et al. v. Ciba-Geigy*, the plaintiffs in *Henson*, referred to as the "Henson Group" were required to dismiss the state court action with prejudice as of the approval date of the Stipulation of Settlement. Rather than obey this Court's clear and unambiguous order, the "Henson Group" and their counsel, Hany A. Zohdy, attempted to thwart this Court's jurisdiction by filing an amended complaint in *Henson* in which they put forward claims which they say do not fall within the ambit of the Stipulation of Settlement.

However, the Stipulation of Settlement clearly states that *any and all claims* in the Related Case (*Henson*) shall be dismissed with prejudice. This Court can discern no subtlety in its Order and therefore, the Court finds that Hany A. Zohdy has acted in a manner calculated to offend this Court and in complete defiance of the Court's Order.

This Court ordered Zohdy to show cause why *he* should not be sanctioned for his defiance (Doc. 153). Zohdy responded only that the *Henson* case should not be the subject of an injunction from this Court and, aside from plaintive calls not to sanction his client, did not address the issue of sanctions to be imposed upon him. For these reasons, it is hereby **ORDERED** that the terms of the Stipulation of

1. *Henson, et al. v. Ciba-Geigy, et al.* has since been removed to Federal court and was transferred to this Court. The case is now identified as 98-1150-CB-S.

Settlement be enforced and *Hurley Henson, et al. v. Ciba-Geigy Corp., et al.*, 98-1150-CB-S (S.D. Ala.) be and hereby is **DISMISSED with PREJUDICE**. Additionally, it is hereby **ORDERED** that Hany A. Zohdy pay all costs incurred by the *Hurley* defendants subsequent to the Approval Date for the *Price* Stipulation of Settlement, August 26, 1994. The *Hurley* Defendants are hereby instructed to file a statement reflecting their reasonable costs in defending this case after August 26, 1994 with this Court no later than December 22, 1998.

DONE this the 24th day of November, 1998.

s/ Charles R. Butler, Jr.
CHIEF DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION NO. 94-0647-CB-S

RUSSELL PRICE, et al., on behalf of themselves and others similarly situated,

Plaintiffs,

v.

CIBA-GEIGY CORPORATION,

Defendant.

ORDER

Pursuant to the Order entered this day in *Price, et al. v. Ciba Geigy*, 94-00647-CB-S (S.D. Ala.) it is hereby **ORDERED, ADJUDGED, and DECREED** that all claims by Plaintiffs, the "Henson Group" be and hereby are **DISMISSED with PREJUDICE**. Pursuant to the Order entered in *Price*, all costs incurred by Defendants here are to be taxed to Hany A. Zohdy, counsel for Plaintiffs, the "Henson Group".

DONE this the 24th day of November, 1998.

s/ Charles R. Butler, Jr.
CHIEF DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION IN *HENSON, et al. v. CIBA-GEIGY CORPORATION, et al.* DATED AND FILED NOVEMBER 24, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION NO. 98-1150-CB-S

HURLEY HENSON, *et al.*,

Plaintiffs,

v.

CIBA-GEIGY CORPORATION, *et al.*,

Defendant.

ORDER

Pursuant to the Order entered this day in *Price, et al. v. Ciba-Geigy*, 94-00647-CB-S (S.D. Ala.) it is hereby **ORDERED, ADJUDGED, and DECREED** that all claims by Plaintiffs, the "Henson Group" be and hereby are **DISMISSED with PREJUDICE**. Pursuant to the Order entered in *Price*, all costs incurred by Defendants here are to be taxed to Hany A. Zohdy, counsel for Plaintiffs, the "Henson Group".

DONE this the 24th day of November, 1998.

s/ Charles R. Butler, Jr.
CHIEF DISTRICT JUDGE

APPENDIX E — STIPULATION OF SETTLEMENT DATED AUGUST 26, 1994

(Revised to Include Enhancements through August 28, 1997)

* * *

D. "APPROVAL DATE" shall mean the date subsequent to the fairness hearing on which the COURT'S final order and judgment becomes final. For purposes of this STIPULATION, the final order and judgment shall be deemed to become final on the later of (i) 10 days after the expiration of the time to appeal, if no appeal is filed; or (ii) if an appeal is filed, on the date on which the final order and judgment is not subject to further judicial review or appeal, either by reason of affirmance by a court of last resort, or by reason of lapse of time or otherwise.

E. "CHLORDIMEFORM" shall mean the chemical described as *N'* - (4-Chloro-*o*-tolyl)-*N*, *N*-dimethylformamidine.

F. "CIBA-GEIGY CORPORATION" shall mean CIBA-GEIGY CORPORATION and any predecessor entities.

G. "CLAIM" shall mean any and all past, present and future claims (known or unknown) by any SETTLEMENT CLASS MEMBER against the DEFENDANT or the ADDITIONAL RELEASEE(S) either arising out of exposure by an EXPOSED PERSON to GALECRON® or on account of a COMPENSABLE MEDICAL CONDITION as defined herein. A CLAIM under this STIPULATION shall include, without limitation, any and all past, present and future claims whether arising under local, state or federal statutory or common or civil law, including, without limitation, any and all manner of actions, causes of action, suits, damages, sums

of money, controversies, agreements, promises, court costs, judgments, attorneys' fees, claims for medical monitoring, claims for consequential damages, claims for equitable relief, and all claims and demands of whatever type in law or equity for (1) personal injury, damage, or death and all forms of mental or emotional harm or risk of harm (including fear or increased risk of contracting any illness) , that are based on, arise out of, or relate to an EXPOSED PERSON'S exposure to GALECRON® or any claim on account of an EXPOSED PERSON'S COMPENSABLE MEDICAL CONDITION as defined herein; (2) wrongful death or survival actions that are based on, arise out of, or relate to an EXPOSED PERSON'S exposure to GALECRON® or to a COMPENSABLE MEDICAL CONDITION as defined herein; (3) loss of support, services, consortium, companionship, society, and other valuable services made by spouses, parents, children, or other relatives of an EXPOSED PERSON, however such claims are denominated, that are based on, arise out of, or relate to an EXPOSED PERSON'S exposure to GALECRON® or to a COMPENSABLE MEDICAL CONDITION as defined herein; and (4) punitive, aggravated, or exemplary damages of any sort that are based on, arise out of, or relate to exposure of an EXPOSED PERSON to GALECRON® or to a COMPENSABLE MEDICAL CONDITION as defined herein, **provided, however, that CLAIMS of spouses, parents, children and other relatives do not include claims by such persons of alleged direct exposure to GALECRON®, unless such person is an EXPOSED PERSON as defined in the STIPULATION; provided, further, that this definition of CLAIM is subject to and limited by the provision set forth in Part XXII of this STIPULATION.**

Appendix E

H. "CLAIMANT" shall mean any individual SETTLEMENT CLASS MEMBER (or legal representative of a SETTLEMENT CLASS MEMBER) who submits a CLAIM for processing under this STIPULATION.

I. "CLAIMANT'S COUNSEL" shall not mean CLASS COUNSEL, but shall mean any attorney who represents a CLAIMANT for purposes of submitting a CLAIM for processing under this STIPULATION.

J. "CLASS ACTION COMPLAINT" shall mean the removed Complaint filed against the DEFENDANT in United States District Court for the Southern District of Alabama entitled RUSSELL PRICE, *et al* versus CIBA-GEIGY CORPORATION, *et al.*

K. "CLASS COUNSEL" shall mean Charles W. Patrick, Jr., and Timothy E. Eble of the law firm of Ness, Motley, Loadholt, Richardson and Poole, Joseph J. McKernan of the McKernan Law Firm, J. Cecil Gardner and S. C. Middlebrooks, III of the law firm of Gardner, Middlebrooks and Fleming, and Patrick W. Pendley, or other such counsel as may be appointed by the COURT.

L. "COMPENSABLE MEDICAL CONDITION" shall mean one of the medical conditions set forth in Part VI of this STIPULATION.

* * *

Appendix E

AE. "PLAINTIFF CLASS REPRESENTATIVES" shall mean Russell W. Price, Leslie E. Hoven, Grady W. Brown, Jack Harley Woodward, and Joe H. Bowman.

AF. "PLANT WORKER" shall mean an individual, whether or not employed by CIBA-GEIGY CORPORATION, who in the course of his or her employment at CIBA-GEIGY CORPORATION's St. Gabriel, Louisiana or McIntosh, Alabama sites was exposed to GALECRON®, including, without limitation, individuals who worked in manufacturing, formulating, or packaging GALECRON®, or in the waste disposal of GALECRON®, or in the construction, demolition or maintenance of any facilities used for the foregoing activities at such St. Gabriel, Louisiana or McIntosh, Alabama sites.

AG. "PROCEDURES" shall mean the medical tests, analyses or screening programs set forth in the MEDICAL MONITORING AND TREATMENT PROGRAM, to be performed in accordance with the protocols and standards promulgated in Exhibit "C."

AH. "QUALIFYING CLAIM" shall mean any CLAIM submitted to the ADMINISTRATOR for processing that is determined to qualify for compensation as a COMPENSABLE MEDICAL CONDITION or pursuant to the MEDICAL MONITORING AND TREATMENT PROGRAM.

AI. "RELATED CASE" shall mean:

1. *Hurley Henson, et al v. Ciba-Geigy Corporation, et al*

   Docket No. 43,620, 18th Judicial District Court, Parish of Iberville, State of Louisiana.

AJ. "RELATED PARTIES" shall mean (1) DEFENDANT'S present and former foreign and domestic parents, subsidiaries and affiliates, including, without limitation, Ciba-Geigy Limited; and (2) the foreign and domestic predecessors, successors, transferees, insurers and assigns of DEFENDANT or of individuals and entities referred to in subsection (1) above.

AK. "SCREENING PARTICIPANT" shall mean an EXPOSED PERSON who at the time of MANIFESTATION of a COMPENSABLE MEDICAL CONDITION has participated continuously in the MEDICAL MONITORING AND TREATMENT PROGRAM for each of the three (3) years prior to such MANIFESTATION or if the MEDICAL MONITORING AND TREATMENT PROGRAM shall have been in existence for less than three (3) years as of the time of MANIFESTATION, then for each year since the inception of such MEDICAL MONITORING AND TREATMENT PROGRAM.

AL. "SETTLEMENT CLASS" shall mean the settlement class conditionally certified by the COURT, consisting of all SETTLEMENT CLASS MEMBERS.

AM. "SETTLEMENT CLASS MEMBERS" shall mean (1) all EXPOSED PERSONS, or their legal representatives,

who, as of the date of filing of the CLASS ACTION COMPLAINT, reside in the United States; and (2) all spouses, parents, children, or other relatives of such EXPOSED PERSONS, or their legal representatives, who reside in the United States. The class shall include all such persons who meet these definitions except those who opt-out of this class action by the opt-out deadline set forth in the notice of SETTLEMENT CLASS certification.

AN. "SETTLEMENT DATE" shall mean the date that the COURT enters an Order directing that Notice be provided to members of the SETTLEMENT CLASS.

AO. "STIPULATION" or "STIPULATION OF SETTLEMENT" shall mean the entirety of this agreement, including all the exhibits hereto.

AP. "TERMINATION DATE" shall mean the date set forth in Part XIX.

AQ. "TOTAL OBLIGATION" shall mean CIBA-GEIGY CORPORATION's maximum liability for funding of the DCA FUND under this STIPULATION of **fifty** million dollars **($50,000,000.00).** TOTAL OBLIGATION as defined herein does not apply to the MMT FUND.

II. Certification of SETTLEMENT CLASS, Notice and Dismissal of RELATED CASE

1. Subject to the COURT'S approval, the parties stipulate that a SETTLEMENT CLASS as defined herein shall be certified for settlement purposes only pursuant to Rule 23(b) (3) of the Federal Rules of Civil Procedure,

without prejudice to the parties' ability to contest or oppose class certification for litigation purposes in this action or in any other action or for any other purpose.

2. Notice shall be disseminated in a manner to be agreed upon by DEFENDANT and CLASS COUNSEL and approved by the COURT.

3. The cost of providing adequate notice to the SETTLEMENT CLASS of this STIPULATION OF SETTLEMENT and their options hereunder (including the costs of media advertisements) will be borne exclusively by the DEFENDANT.

4. CLASS COUNSEL hereby stipulates that the RELATED CASE, including any and all claims (including, without limitation any CLAIMS defined herein) against CIBA GEIGY CORPORATION and individual defendants, Edee Templet, Kenneth A. DeVun and Robert Babb, shall be dismissed, with prejudice, as of the APPROVAL DATE, and that such RELATED CASE shall be stayed until the APPROVAL DATE. Further, as of the APPROVAL DATE, CLASS COUNSEL also agrees that such individual defendants shall have no obligations or liability whatsoever under this STIPULATION.

III. Exclusive Remedy

A. All CLAIMS shall be submitted to the ADMINISTRATOR in writing by the CLAIMANT in accordance with the procedures set forth in or developed pursuant to this STIPULATION. Submission of CLAIMS under this STIPULATION shall be the exclusive remedy of

all SETTLEMENT CLASS MEMBERS for any CLAIM against either the DCA or MMT FUNDS, the DEFENDANT or the ADDITIONAL RELEASEE(S), and a CLAIM submitted hereunder shall be in lieu of any other remedy or right of action against the DCA or MMT FUNDS, the DEFENDANT or the ADDITIONAL RELEASEE(S) for such CLAIMS, except as specifically provided in this STIPULATION. Accordingly, no DEFENDANT or ADDITIONAL RELEASEE(S) shall be subject to liability or expense of any kind to any SETTLEMENT CLASS MEMBER with respect to any CLAIM, other than as set forth in this STIPULATION; and each SETTLEMENT CLASS MEMBER, upon the COURT'S entry of an order approving the STIPULATION, shall be enjoined by that order from instituting or maintaining any CLAIM against the DEFENDANT or the ADDITIONAL RELEASEE(S) in any state or federal court or other forum, other than as set forth in this STIPULATION.

B. The COURT shall retain jurisdiction over this case and the DCA and MMT FUNDS and shall use its equitable powers to enforce this STIPULATION and to protect its jurisdiction over this case and all parties and SETTLEMENT CLASS MEMBERS. The COURT shall have jurisdiction over all phases of this STIPULATION.

C. The ADMINISTRATOR, the MEDICAL ADVISORY PANEL, and the EPIDEMIOLOGY PANEL shall be officers of the COURT and shall be entitled to judicial immunity to the full extent permitted by law.

* * *

Appendix E

X. Releases and Dismissal of Actions

A. "DEEMED RELEASE." Approval of this STIPULATION OF SETTLEMENT shall operate as a release by each SETTLEMENT CLASS MEMBER of the DEFENDANT and the ADDITIONAL RELEASEE(S) as of the APPROVAL DATE pursuant to which all CLAIMS by that SETTLEMENT CLASS MEMBER are settled, released and dismissed in their entirety, on the merits, and with prejudice (hereinafter "DEEMED RELEASE"). By operation of the DEEMED RELEASE, the SETTLEMENT CLASS MEMBERS, separately and severally, fully, finally, and forever release the DEFENDANT and ADDITIONAL RELEASEE(S), separately and severally, of and from all CLAIMS, which each SETTLEMENT CLASS MEMBER ever had, now has or which each SETTLEMENT CLASS MEMBER hereafter can, shall or may have. By operation of the DEEMED RELEASE, each SETTLEMENT CLASS MEMBER releases all CLAIMS against the ADDITIONAL RELEASEE(S), in each and every capacity that such claim may be asserted against the ADDITIONAL RELEASEE(S), including, without limitation, their corporate relationship with DEFENDANT, as the supplier of any material used in GALECRON®, as a participant, directly or indirectly, in any act complained of, or any basis for the assertion of vicarious liability. CIBA-GEIGY CORPORATION's obligations pursuant to this STIPULATION shall constitute consideration for the above releases and SETTLEMENT CLASS MEMBERS shall be limited, on and after the APPROVAL DATE, to the relief set forth in this STIPULATION (and the enforcement of this STIPULATION solely as against CIBA-GEIGY CORPORATION and/or its insurers) as their sole recourse on account of any and all CLAIMS.

Appendix E

B. *Giving of Releases.*

All SETTLEMENT CLASS MEMBERS who do not timely opt-out shall be deemed to provide each of the DEFENDANT and ADDITIONAL RELEASEE(S) with a DEEMED RELEASE.

C. *Effect of Releases.* The above shall in no way release any claims other than the CLAIMS defined in paragraph I.G.

D. *Dismissal of Actions.* In addition to the dismissal of RELATED CASE, as set forth in Part II above, on the APPROVAL DATE, CLASS COUNSEL shall cooperate with DEFENDANT and ADDITIONAL RELEASEE(S) to stay or dismiss, as appropriate, any other action of any SETTLEMENT CLASS MEMBER pending or later commenced in any state or federal court or other forum.

* * * *

APPENDIX F — LEFT BLANK INTENTIONALLY

[Left Blank Intentionally]

Appendix F

[Left Blank Intentionally]

[Left Blank Intentionally]

[Left Blank Intentionally]

[Left Blank Intentionally]

[Left Blank Intentionally]

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED NOVEMBER 24, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 98-1150-CB-S

HURLEY HENSON, *et al.*,

Plaintiffs,

v.

CIBA-GEIGY CORPORATION, *et al.*,

Defendant.

ORDER

Pursuant to the Order entered this in *Price, et al. v. Ciba-Geigy*, 94-00647-CB-S (S.D. Ala.) it is hereby **ORDERED, ADJUDGED, and DECREED** that all claims by Plaintiffs, the "Henson Group" be and hereby are **DISMISSED WITH PREJUDICE**. Pursuant to the Order entered in *Price*, all costs incurred by Defendants here are to be taxed to Hany A. Zohdy, counsel for Plaintiffs, the "Henson Group".

DONE this the 24th day of November, 1998.

s/ Charles R. Butler, Jr.
CHIEF DISTRICT JUDGE

APPENDIX H — STIPULATION OF SETTLEMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA DATED AND FILED JANUARY 30, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CASE NO. 94-0647-CB-S

RUSSELL PRICE, et al., on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

CIBA-GEIGY CORPORATION, a corporation,

Defendant.

STIPULATION BETWEEN CLASS COUNSEL, THE CARPENTER AND HENSON GROUPS, HERETOFORE THE CARPENTER AND HENSON OBJECTORS, AND DEFENDANT, CIBA-GEIGY CORPORATION, AMENDING STIPULATION OF SETTLEMENT

Appendix H

It is hereby stipulated that the Henson and Carpenter Groups[1] do hereby withdraw all of their objections to the Stipulation of Settlement heretofore entered into and it is further stipulated that the following enhancements will be incorporated into the Stipulation of Settlement dated August 26, 1994 ("STIPULATION"):

The above-referred to enhancements are as follows:

1. Section I(Y) of the STIPULATION is amended to add the following: "MEDICAL EVIDENCE shall include completed human epidemiology studies sponsored by CIBA-GEIGY CORPORATION, even if unpublished;"

2. Section VI(E)(4) of the STIPULATION is amended to provide as follows: "The determination of the EPIDEMIOLOGY PANEL pursuant to Section VI(E) may be appealed to the Court pursuant to Rule 53(e) of the Federal Rules of Civil Procedure. The EPIDEMIOLOGY PANEL shall be deemed a Special Master to the Court solely for the purpose of permitting an appeal pursuant to Rule 53(e) of the Federal Rules of Civil Procedure."

3. Section VI(B) of the STIPULATION is amended to provide a Section "4" as follows:

---

1. The Henson Group consists of the individuals denominated "Applicants" on page one of the Motion to Permit Intervention and Notice of Intent to Appear, filed on behalf of Hurley Henson, et al, on or about December 16, 1994.

The Carpenter Group consists of the individuals denominated "Carpenter Objectors" on the Notice of Appearance filed on behalf of James Carpenter, et al on or about December 16, 1994.

Appendix H

"4. *Metastasis Or Organ Removal Incident To Certain Carcinomas Of The Urinary Collection System.*

The Metastasis or Organ Removal Incident to Certain Carcinomas of the Urinary Collecting System condition shall have the following requirements:

a. All of the requirements for the Certain Carcinomas of the Urinary Collecting System condition set forth in Part B.2.a. and b. above; and

b. A diagnosis by a BOARD-CERTIFIED PATHOLOGIST, ONCOLOGIST OR UROLOGIST that the EXPOSED PERSON'S primary carcinoma of the urinary collecting system (as defined in Part B.2. above) has either (1) resulted in treatment requiring removal of an organ outside the urinary collecting system, or (2) metastasized beyond the urinary collecting system.

The Metastasis or Organ Removal Incident to Certain Carcinomas of the Urinary Collecting System condition shall not include any carcinomas within the urinary collecting system. The Metastasis or Organ Removal Incident to Certain Carcinomas of the Urinary

Collecting System shall not include any carcinomas outside the urinary collecting system unless such carcinomas result from a metastasis of the EXPOSED PERSON'S primary carcinoma of the urinary collecting system."

4. Exhibit A to the STIPULATION is amended to add a new Section "G" as follows:

"G. An EXPOSED PERSON who submits a QUALIFIED CLAIM for compensation for the Metastasis or Organ Removal Incident to Certain Carcinomas of the Urinary Collection System condition shall receive from the DCA FUND 25% of the amount set forth in Paragraph B of this Exhibit C (with age to be determined at the time of the relevant diagnosis or surgery); provided, however, that there shall be a 12.5% reduction if the EXPOSED PERSON does not qualify as a NON-SMOKER, a 25% reduction if the EXPOSED PERSON does not qualify as a SCREENING PARTICIPANT, and a 37.5% reduction if the EXPOSED PERSON does not qualify as either a NON-SMOKER or a SCREENING PARTICIPANT. An EXPOSED PERSON may obtain only one payment under this Part G regardless of the number of occurrences. However, an EXPOSED PERSON may receive compensation under this Part G in addition to compensation (if they so qualify) under Parts A, B, C and D."

5. Section D of Exhibit A of the STIPULATION relating to compensation for hemorrhagic cystitis is amended to strike all references to the number "$1,000" and substitute the number "$2,000."

6. Section VII of the STIPULATION relating to Timeliness of Claims is amended to strike all references to "365 days" and to substitute "two years."

7. Section I(D) of the STIPULATION is amended to add the following: "The ADMINISTRATOR shall have no prior or existing affiliation with CIBA-GEIGY CORPORATION; provided, however, the Court may waive this requirement for good cause shown.

8. Section I(G) of the STIPULATION is amended to add the phrase: "provided, however, that CLAIMS of spouses, parents, children and other relatives do not include claims by such persons of alleged direct exposure to GALECRON®, unless such person is an EXPOSED PERSON as defined in the STIPULATION."

9. Section VI(A)(5) of the STIPULATION is amended to add to the definition of MEDICAL EXAMINER: "or his assistant, who is a licensed medical doctor."

10. The Court shall determine, under Section V(A) of the STIPULATION, the standard of proof that will be applied by the Administrator in determining what constitutes "sufficient evidence of occupationally related exposure."

11. Section 2 of Exhibit C of the STIPULATION shall be amended to add the following:

"In addition to the PROCEDURES set forth herein, an EXPOSED PERSON shall be entitled to two additional urologist office visits, or visits with a licensed medical doctor recommended by the urologist, in the first year of the EXPOSED PERSON'S participation in the MEDICAL MONITORING PROGRAM, for the purpose of permitting the EXPOSED PERSON to seek medical counselling or advice concerning the MEDICAL MONITORING PROGRAM and/or medical issues arising out of exposure to GALECRON®."

12. Section I(AQ) of the STIPULATION relating to the TOTAL OBLIGATION is amended to strike "forty-five million dollars ($45,000,000.00)" and to substitute "fifty million dollars ($50,000,000.00)".

13. Section I(G) of the STIPULATION is amended to add to the definition of CLAIM, as amended by Paragraph 8 above, the following language:

> . . . ; provided, further, that this definition of CLAIM is subject to and limited by the provision set forth in Part XXII of this STIPULATION.

14. Section XI(A) of the STIPULATION is amended to add the following language to the end of this Section:

> . . . ; provided, however, that this bar does not apply to claims for contribution, indemnity or reimbursement that may be asserted by any

> Third Party as a result of payment of disability or death benefits to any SETTLEMENT CLASS MEMBER by such Third Party pursuant to any applicable workers' compensation or similar statutory provision for compensation by an employee against an employer. CIBA-GEIGY CORPORATION reserves its right to assert any and all defenses with respect to the merits of any Third Party contribution, indemnity or reimbursement claim arising from the payment by such Third Party of disability or death benefits, as referenced in this Paragraph.

15. The following language will be jointly proposed by the parties to this Stipulation for inclusion in the Court's Final Judgment:

> Pursuant to Federal Rule of Civil Procedure 23(e), this Court's final approval of this STIPULATION OF SETTLEMENT is a result of this Court's independent finding, after a full presentation of the evidence, that the STIPULATION OF SETTLEMENT is non-collusive, fair, reasonable and adequate, with such finding constituting a judgment, as opposed to a compromise or settlement, as contemplated by Louisiana's Workers' Compensation Act, LSA-R.S. 23:1021, *et seq.*, or any other state's workers' compensation statutory provisions.

This Court further finds that the STIPULATION OF SETTLEMENT does not release the claim of any SETTLEMENT CLASS MEMBER arising under workers'

compensation or similarly statutory provisions for compensation by an employee against an employer.

This Court further finds that the STIPULATION OF SETTLEMENT specifically reserves to Third Parties any claims for contribution, indemnity or reimbursement against CIBA-GEIGY CORPORATION for disability or death benefits paid by any Third Party to any SETTLEMENT CLASS MEMBER pursuant to workers' compensation or similar statutory provisions for compensation by an employee against an employer, and that SETTLEMENT CLASS MEMBERS are not obligated pursuant to this STIPULATION OF SETTLEMENT to indemnify DEFENDANT or ADDITIONAL RELEASEE(S) in the event that such Third Party claims for disability or death benefits paid by any Third Party to any SETTLEMENT CLASS MEMBER is asserted against CIBA-GEIGY CORPORATION or ADDITIONAL RELEASEE(S).

Based on the foregoing findings, this Court concludes that as a matter of both law and public policy, the rights of employers and/or the workers' compensation carriers of employers of SETTLEMENT CLASS MEMBERS have not been and will not be prejudiced in any way as a result of this Court's approval of this STIPULATION OF SETTLEMENT, and these employers and/or workers' compensation carriers of employers of SETTLEMENT CLASS MEMBERS cannot thereby assert this STIPULATION OF SETTLEMENT in any other action or proceeding as a bar to any SETTLEMENT CLASS MEMBER'S claim against that employer and/or workers' compensation carrier of that employer, pursuant to any applicable workers' compensation or similar statutory provision for compensation by an employee against an employer.

16. Defendant, CIBA GEIGY CORPORATION, agrees to follow its normal record retention policy with regard to all documents relating to Galecron.

17. If the STIPULATION is approved by the Court, the parties to this Stipulation will jointly move the Court for an order: (a) permitting class counsel to notify settlement class members who timely excluded themselves from the class action ("opt outs") of the enhancements to the STIPULATION, and of the Court's approval of the STIPULATION; and (b) providing that opt outs may become members of the settlement class by so advising the Court in writing within 60 days after issuance of such notice. A post card addressed to the Clerk of Court shall be included in the notice for such purpose.

18. Paragraphs 1-10 have been negotiated with the Henson Group; Paragraph 11 has been negotiated with Class Counsel; and Paragraphs 12 and 17 have been negotiated with the Henson Group, Carpenter Group and Class Counsel; and Paragraphs 13-16 have been negotiated with the Carpenter Group.

It is further stipulated that Class Counsel and Counsel for CIBA GEIGY CORPORATION hereby withdraw any objection to the intervention of the Henson and Carpenter Groups, providing that the intervention is solely limited to the purpose of assuring the implementation of these enhancements under the STIPULATION, including the right to petition for attorney's fees to the extent these intervening counsel have created additional monetary benefits to the Class by these enhancements.

APPENDIX I — NOTICE OR REMOVAL IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED OCTOBER 13, 1998

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 98-866-B-3

DIVISION

HURLEY HENSON, PHILIP HANO, JOE BOWMAY, RANDALL SEVARIO, SR., BETTY HANO, DAVID GRAY, RANDALL SEVARIO, JR.

versus

CIBA-GEIGY CORPORATION, ROBERT BABB, EDEE TEMPLET, KENNETH A. DeVUN

FILED: _____ _____
DEPUTY CLERK

NOTICE OF REMOVAL

NOW INTO COURT, through undersigned counsel, come defendants, Ciba-Geigy Corporation (Ciba-Geigy), Robert Babb, Edee Templet and Kenneth A. DeVun, who respectfully file this Notice of Removal with this Court for the following reasons:

Appendix I

I.

Plaintiffs originally filed this class action against defendants on September 15, 1993 in the 18th Judicial District Court for the Parish of Iberville, State of Louisiana, seeking damages for injuries allegedly sustained as a result of Hurley Henson's, Philip Hano's, Joe Bowman's, Randall Sevario, Sr.'s, Betty Hano's, David Gray's, Randall Sevario, Jr.'s and all other individuals' exposure to "toxic, noxious, and carcinogenic chemicals including, but not limited to chlordimeform and atrazine" at the Ciba-Geigy, St. Gabriel, Iberville Parish, Louisiana facility. (Exhibit "A," Paragraph 4).

II.

Subsequently, plaintiffs became members of a class action lawsuit, entitled *Russell Price, et al. on behalf of themselves and Others Similarly Situated v. Ciba-Geigy Corporation, a Corporation*, and bearing Civil Action No. 94-0647-B-5, on the docket of the United States District Court for the Southern District of Alabama, Southern Division (hereinafter "Prior Class Action") which sought damages for Galecron and Chlordimeform exposure.

III.

The Price Class Action was settled as to all plaintiffs and defendants herein by virtue of a Stipulation of Settlement and two Orders issued by the United States District Court for the Southern District of Alabama, Southern Division, on March 31, 1995 and April 3, 1995, approving the Stipulation of Settlement. (Exhibits "B," "C" and "D").

Appendix I

IV.

As a part of the ordered settlement, plaintiffs were required to dismiss all of their claims in this case, *Hurley Henson, et al v. Ciba-Geigy Corporation, et al*, Docket No. 43, 620, 18th Judicial District Court, Parish of Iberville, State of Louisiana. (Exhibit "B" pp. 15 and 18).

V.

Instead of dismissing their claims, and in direct disobedience of the Orders of the United States District Court for the Southern District of Alabama, Southern Division, plaintiffs filed an Amendment to Plaintiffs' Original Class Action Petition, which was first received by defendants on September 14, 1998. In the petition, plaintiffs claimed damages for alleged exposure to Chlordimeform and other chemicals. (See page 2 of Exhibit "E").

VI.

Pursuant to 28 U.S.C. §1441(a), the United States District Court for the Middle District of Louisiana is a district and division within which the above-described state court suit is pending.

VII.

This Court has original jurisdiction over this action under **28 U.S.C. §1651,** and the action is one which may be removed to this Court by defendants pursuant to the provisions of **28 U.S.C. §1441, *et. seq.*,** because the plaintiffs' amended petition is an action to recover damages on claims which

Appendix I

have been settled, released or required to be dismissed by Court Order. Plaintiffs' alleged exposure arises out of the claims that were previously settled as to all defendants herein, and on which Judgments were entered by the United States District Judge Charles R. Butler, Jr., Chief District Judge, in the Price Class Action.

VIII.

28 U.S.C. §1651, which protects a federal court's continuing jurisdiction over its orders, permits the removal of state court actions in situations where necessary to protect such jurisdiction. In the Price Class Action, Judge Butler expressly declared that the United States District Court for the Southern District of Alabama, Southern Division, retained jurisdiction with respect to future performance of, and any claims related to the performance of, the Settlement Agreements and Judgments. (See Exhibits "B," "C" and "D").

IX.

The Stipulation of Settlement and the Orders issued by Judge Butler in the Price Class Action specifically required plaintiffs to dismiss the *Henson* suit, which they did not do. (See p. 18, Paragraph 4 of Exhibit "B").

X.

The claims and issues set forth in plaintiffs' amended petition are legally barred by the terms of the Price Class Action settlement. Any Judgment entered by any other court will necessarily modify, interpret, or otherwise affect the mandates of the Settlement Agreements and Judgments in

Appendix I

the Price Class Action. The claims set forth in plaintiffs' Amendment to Plaintiffs' Original Class Action Petition constitute a collateral challenge to the adequacy of the settlements and Judgments and is a direct threat to the continued implementation of these settlements and Judgments. Therefore, the exercise of jurisdiction by this Court pursuant to **28 U.S.C. § 1651** is necessary and proper (1) to protect the integrity of the Settlement Agreements and Judgments; (2) to prevent the relitigation of matters already decided; (3) to prevent the possibility of inconsistent or conflicting rulings; (4) to preserve the defendants' ability to comply with the Settlement Agreements and Judgments; and (5) to protect the Court's continued jurisdiction to oversee and monitor the Settlement Agreements and Judgments in the Price Class Action.

XI.

Furthermore, the Order approving the Stipulation of Settlement in the Price Class Action "enjoined" the institution or maintaining of any claim against Ciba-Geigy, as well as their employees, in any state or federal court or other forum. Therefore, the amended petition filed by plaintiffs is in contempt of the Order issued by the United States District Court for the Southern District of Alabama, Southern Division, specifically enjoining such actions. (See "Exclusive Remedy" section of Stipulation of Settlement for the Price Class Action, Exhibit "B" p.19).

XII.

As a result of the foregoing, this Court has residual jurisdiction or authority pursuant to **28 U.S.C. §1651.**

Appendix I

XIII.

This Court also has jurisdiction over this action under the provisions of **28 U.S.C. §1367** because the claims in this action are so related to claims in the Price Class Action "that they form part of the same case or controversy under Article III of the United States Constitution."

XIV.

This Notice of Removal is being filed less than thirty (30) days after the defendants' receipt of the Amendment to Plaintiffs' Original Class Action Petition on September 14, 1998. Accordingly, the removal is timely under **28 U.S.C. §1446 (B).** (Exhibit "B").

XV.

A copy of Plaintiffs' Original Class Action Petition, Amendment to Plaintiffs' Original Class Action Petition and all papers filed in the pending state court are attached hereto as Exhibit "F".

XVI.

Defendants have simultaneously filed with this Notice of Removal a Motion to Transfer this matter to the United States District Court for the Southern District of Alabama, Southern Division.

Appendix I

XVII.

Upon filing this Notice of Removal, defendants have given written notice to all other parties by furnishing copies of this Notice of Removal, and will file forthwith written notice of this Notice of Removal in the 18th Judicial District Court for the Parish of Iberville, State of Louisiana.

WHEREFORE, defendants, Ciba-Geigy Corporation ("Ciba-Geigy"), Robert Babb, Edee Templet and Kenneth A. DeVun, pray that the above state court action be removed from the 18th Judicial District Court for the Parish o Iberville, State of Louisiana, to this Honorable Court.

Respectfully submitted,

ADAMS AND REESE

By: s/ Henry B. Alsobrook, Jr.
HENRY B. ALSOBROOK, JR. (#2431)
MARK C. SURPRENANT (#12582)
VALERIA M. SERCOVICH (#24642)
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Counsel for Defendants, Ciba-Geigy Corporation, Robert Babb, Edee Templet, and Kenneth A. DeVun

APPENDIX J — MOTION TO TRANSFER IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED OCTOBER 13, 1998

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 98-866-B-3

DIVISION

HURLEY HENSON, PHILIP HANO, JOE BOWMAN, RANDALL SEVARIO, SR., BETTY HANO, DAVID GRAY, RANDALL SEVARIO, JR.

versus

CIBA-GEIGY CORPORATION, ROBERT BABB, EDEE TEMPLET, KENNETH A. DeVUN

FILED: _____ _____
DEPUTY CLERK

MOTION TO TRANSFER

NOW INTO COURT, through undersigned counsel, come defendants, Ciba-Geigy Corporation ("Ciba-Geigy"), Robert Babb, Edee Templet and Kenneth A. DeVun, who move the Court to transfer the above entitled cause of action to the United States District Court for the Southern District of Alabama, Southern Division, on the grounds that the Honorable Charles R. Butler, Jr., Chief District Judge of the

Appendix J

United States District Court for the Southern District of Alabama, Southern Division, ordered this case to be dismissed as part of the Stipulation of Settlement in the class action lawsuit, entitled *Russell Price, et al. on behalf of themselves and Others Similarly Situated v. Ciba-Geigy Corporation, a Corporation*, bearing Civil Action No. 94-0647 B-5, on the docket of the United States District Court for the Southern District of Alabama, Southern Division, ("Price Class Action"). Further, Judge Butler specifically maintained jurisdiction over the plaintiffs and the cause of action that they bring herein, pursuant to an Order signed by Judge Butler on the 31st day of March, 1995, and a Judgment signed by him on April 3, 1995, copies of which are attached to the Memorandum in Support of this Motion. Contemporaneously filed with this Motion to Transfer, defendants have filed a Notice of Removal based on 28 U.S.C. §1651, 28 U.S.C. §1441, *et. seq.*, and 28 U.S.C. §1367.

Respectfully submitted,

ADAMS AND REESE

By: s/ Henry B. Alsobrook, Jr.
HENRY B. ALSOBROOK, JR. (#2431)
MARK C. SURPRENANT (#12582)
VALERIA M. SERCOVICH (#24642)
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Counsel for Defendants, Ciba-Geigy Corporation, Robert Babb, Edee Templet, and Kenneth A. DeVun

APPENDIX K — MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED OCTOBER 13, 1998

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NO.

DIVISION

HURLEY HENSON, PHILIP HANO, JOE BOWMAY, RANDALL SEVARIO, SR., BETTY HANO, DAVID GRAY, RANDALL SEVARIO, JR.

versus

CIBA-GEIGY CORPORATION, ROBERT BABB, EDEE TEMPLET, KENNETH A. DeVUN

FILED: _____ _____
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER

MAY IT PLEASE THE COURT,

Plaintiffs originally filed this class action lawsuit against defendants, Ciba-Geigy Corporation ("Ciba Geigy"), Robert Babb, Edee Templet, and Kenneth A. DeVun,

on September 15, 1993 in the 18th Judicial District Court for the Parish of Iberville, State of Louisiana, seeking damages for injuries allegedly sustained as a result of exposure to "various toxic and carcinogenic chemicals, including, but not limited to chlordimeform and atrazine" at the Ciba-Geigy, St. Gabriel, Iberville Parish, Louisiana facility by Hurley Henson, Philip Hano, Joe Bowmay, Randall Sevario, Sr., Betty Hano, David Gray, Randall Sevario, Jr. and other individuals. (Exhibit "A," p. 2, ¶ 4).

Subsequently, plaintiffs became members of a class action lawsuit, entitled *Russell Price, et al. on behalf of themselves and Others Similarly Situated v. Ciba-Geigy Corporation, a Corporation*, bearing Civil Action No. 94-0647 B-5, on the docket of the United States District Court for the Southern District of Alabama, Southern Division, ("Price Class Action") which sought damages for exposure to Galecron and Chlordimeform. Chlordimeform is the name of a chemical that is the active ingredient in the product whose trade name is Galecron®, which was manufactured by Ciba-Geigy.

On March 31, 1995, the Honorable Charles R. Butler, Jr., Chief District Judge of the United States District Court for the Southern District of Alabama, Southern Division, entered an Order certifying a settlement pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) of a Settlement Class including the plaintiffs herein. This Order was reiterated in a Judgment dated April 3, 1995. (Exhibits "B" and "C").

As a part of the ordered Settlement, plaintiffs were required to dismiss all of their claims in the present case. The Stipulation of Settlement refers to the instant suit, *Hurley Henson, et al v.*

Ciba-Geigy Corporation, et al, Docket No. 43, 620, 18th Judicial District Court, Parish of Iberville, State of Louisiana, as the RELATED CASE (Exhibit "D," pp. 15 and 16). In regards to this case, the Stipulation of Settlement specifically states that this suit was to be dismissed, with prejudice, as of the approval date of the settlement:

> CLASS COUNSEL hereby stipulates that the RELATED CASE, including any and all claims (including without limitation any CLAIMS defined herein) against CIBA GEIGY CORPORATION and individual defendants, Edee Templet, Kenneth A. DeVun and Robert Babb, shall be dismissed, with prejudice, as of the APPROVAL DATE, and that such RELATED CASE shall be stayed until the APPROVAL DATE. Further, as of the APPROVAL DATE, CLASS COUNSEL also agrees that such individual defendants shall have no obligations or liability whatsoever under this STIPULATION.

(Exhibit "D," p. 18)[1].

In the Judgment certifying the Settlement Class and approving the class settlement, Judge Butler made the Stipulation of Settlement an appendix to his Order of March 31, 1995, and found it to be fair, adequate and reasonable under Federal Rules of Civil Procedure 23(a). (Exhibit "B"). Judge Butler specifically retained jurisdiction "with respect

1. This exhibit is a composite which includes Court ordered enhancements to the original Stipulation of Settlement.

to future performance of, and any claims related to performance of, the Settlement agreement and judgment." (Exhibits "B" and "C").

Rather than dismissing their claims, and in direct disobedience of the order of the United States District Court for the Southern District of Alabama, Southern Division, plaintiffs filed an Amendment to Plaintiffs' Original Class Action Petition, which was first received by defendants on September 14, 1998. In the petition, plaintiffs claimed damages for alleged exposure to Chlordimeform and other chemicals. (See Exhibit "E," p. 2). Plaintiffs' amended petition is an action to recover damages on claims which have been settled, released or required to be dismissed by Court Order. Plaintiffs' alleged exposure arises out of the claims that were previously settled as to all defendants herein, and on which Judgments were entered by Judge Butler in the Price Class Action.

Contemporaneously filed with this Motion to Transfer, defendants have filed a Notice of Removal to this Honorable Court based on 28 U.S.C. §1651, 28 U.S.C. §1441, *et. seq.*, and 28 U.S.C. §1367.

LAW AND ARGUMENT

28 U.S.C. §1651, the All Writs Act, provides that district courts "may issue all writs necessary or appropriate in the aid of their respective jurisdictions." Under the All Writs Act, a federal court may permit removal of state court proceedings to effectuate or prevent the frustration of existing orders of the federal court. *United States v. New York*

Tel. Co., 434 U.S. 159 (1977); *In re Agent Orange Prod. Liability Litigation*, 996 F.2d 1425, 1431 (2nd Cir. 1993). This includes a class action settlement previously reached in federal court. *See Agent Orange*, 966 F.2d at 1431; *Sable v. General Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996); *In re VMS Sec. Litig.*, 103 F.3d 1317, 1323-1326 (7th Cir. 1996). Additionally, in the context of class action litigation, a federal district court may use the All Writs Act to remove or enjoin prosecution of subsequent state court claims to enforce its ongoing orders against relitigation and to guard the integrity of its prior rulings over which it expressly retained jurisdiction. *Wesch v. Folsom*, 6 F.3d 1465 (11th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994); *Battle v. Liberty Nat. Life Ins. Co.*, 877 F.2d 877 (11th Cir. 1989); *In re VMS Sec. Litig.*, 103 F.3d 1317, 1323-1326 (7th Cir. 1996).

Pursuant to the All Writs Act as well as the inherent power of the Court to transfer cases in the interest of justice under 28 U.S.C. 1404, defendants submit that this case should be transferred to United States District Court for the Southern District of Alabama, Southern Division, to be consolidated with Case No. 94-0647-CB-S, entitled "*Russell Price, et al v. Ciba-Geigy Corporation.*"[2] This transfer is appropriate in order to effectuate and prevent the frustration of the Orders and Judgment the Alabama court previously issued in its exercise of jurisdiction in the Price Class Action. *See In Re*

2. For cases which have been transferred pursuant to the All Writs Act *see Hunt v. Bankers Trust Co.*, 799 F.2d 1060 (5th Cir. 1986); *In Re Agent Orange Product Liability Litigation*, 996 F.2d 1425, 1431 (2nd Cir. 1993), *cert. denied*, 114 S. Ct. 1126, 127 L.Ed.2d 434 (1994). *See also*, Order Transferring Case in the matter of *Puebla v. Pfizer*, No. SACV 94-671 GLT (Eex), Central District of California, attached hereto as Exhibit "F."

Agent Orange Product Liability Litigation, 996 F.2d 1425, 1431 (2nd Cir. 1993), *cert. denied*, 114 S. Ct. 1126, 127 L.Ed.2d 434 (1994).

Since the United States District Court for the Southern District of Alabama, Southern Division, has retained jurisdiction over the Price Class Action it has authority to ensure that the Stipulation of Settlement it previously approved is enforced according to its terms. A federal court retains the power to enforce and to consider challenges to settlements entered into in cases originally filed with the court. *Ryan v. Dow Chemical Co.*, 781 F. Supp. 902 (E.D.N.Y. 1991). Thus, the United States District Court for the Southern District of Alabama, Southern Division, has the power and the obligation to protect and effectuate its orders and final judgments in the Price Class Action and ensuring that those orders and judgments are not being flouted. The Stipulation of Settlement and the Orders issued by Judge Butler specifically required plaintiffs to dismiss the Henson suit, which they did not do. (See Exhibit "D," p. 18, Paragraph 4). Thus, the Southern District of Alabama, Southern Division, is the court best situated to handle this case.

CONCLUSION

Because the United States District Court for the Southern District of Alabama, Southern Division, has specifically order this case to be dismissed and entered a Judgment retaining jurisdiction over the plaintiffs herein, this Honorable Court should transfer this case to the United States District Court for the Southern District of Alabama, Southern Division, to be consolidated with Case No. 94-0647-CB-S, entitled "*Russell Price, et al v. Ciba-Geigy Corporation.*"

Respectfully submitted,

ADAMS AND REESE

By: s/ Henry B. Alsobrook, Jr.
HENRY B. ALSOBROOK, JR. (#2431)
MARK C. SURPRENANT (#12582)
VALERIA M. SERCOVICH (#24642)
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Counsel for Defendants, Ciba-Geigy Corporation, Robert Babb, Edee Templet, and Kenneth A. DeVun

APPENDIX L — TRANSCRIPT OF THE 18TH JUDICIAL DISTRICT FOR PARISH OF IBERVILLE, STATE OF LOUISIANA DATED AUGUST 18, 1998

18TH JUDICIAL DISTRICT
PARISH OF IBERVILLE
STATE OF LOUISIANA

NO. 43,620

HURLEY HENSON, ET AL

VERSUS

CIBA-GEIGY CORPORATION

TRANSCRIPT OF THE ABOVE-ENTITLED PROCEEDING CAME ON FOR HEARING IN OPEN COURT AT THE PARISH COURTHOUSE LOCATEDIN PLAQUEMINE, IBERVILLE PARISH, LOUISIANA, ON THE 18TH DAY OF AUGUST, 1998.

THE HONORABLE JACK T. MARIONNEAUX, JUDGE, PRESIDING.

* * *

[2] OFFICIAL PROCEEDINGS OF AUGUST 18, 1998:

(Bailiff Calls Court to Order)

THE COURT:

What's the story on this?

Appendix L

MR. PENDLEY:

Judge, this is a rule to show cause in *Hurley Henson, et al vs. Ciba Geigy Corporation*, No. 43,620. And I'm the mover as class counsel in the *Russell Price, et al vs. Ciba Geigy*. It's on the docket United States District Court for the Southern District of Alabama. And I will let Mr. Zohdy introduce himself.

MR. ZOHDY:

Your Honor, my name is Hany Zohdy, I represent Hurley Henson. This matter came on by mutual cause by class counsel on the *Price vs. Ciba Geigy* who is also plaintiff counsel in the matter entitled *Hurley Henson vs. Ciba Geigy* within Your Honor's jurisdiction in this Court.

MR. PENDLEY:

Your Honor, this is a rule to show cause why this matter should not be dismissed. And very briefly the procedural history of this litigation is thus: This lawsuit was filed in 1993 as a class action by Mr. Henson and others against Ciba Geigy for exposure to a chemical called Galecron, which is a trade name. The actual chemical is Chlordimeform.

This litigation progressed for some period of time and in the settlement, a national settlement was reached with Ciba Geigy. The national [3] settlement was confected and approved in litigation that was filed after that in the United States District Court for the Southern District of Alabama called *Price vs. Ciba Geigy*. And the settlement, which I have

here and which I can look in — I have my actual copy of the settlement which is an original was filed in the *Price* matter in August of 1994. And at this time, Your Honor, we would offer, introduce and file in evidence the huh, this original with leave of Court to substitute a copy huh, with leave to substitute because this is the only original copy that I have. I will represent to the Court that the stipulation of settlement was executed in multiple originals, and of course, as class counsel I have one of them.

Now the *Price* settlement provided for a medical monitoring program for the class members who did not opt out as well as cash payments for the class members upon the manifestation of certain physical symptoms resulting from the class members' exposure to Chlordimeform. And I'm not going to get into all of the various permutations of the benefits, but it involved whether or not they smoked. And the only thing that a class member had to be able to establish is 1) that he was exposed to Chlordimeform; and 2) that he had a medical condition that a medical doctor would certify that he had and that is it. He had to have exposure, a manifestation — he didn't even, to get the benefits he didn't even have to have testimony that links it. It is just presumed that [4] if he's exposed and he's got condition "A" then he gets the benefits according to the schedule.

Now, the reason we are here is that on Page 40 and 41 of the settlement agreement in *Price*, the stipulation of settlement, which was approved by the Court, it is Subchapter 10 it says releases and dismissal of actions, okay. And in Chapter 10(D), Paragraph D as in "David" in addition to dismissal of the *Price* case class counsel shall cooperate with

defendant and additional releasees to stay or dismiss when appropriate any other action of any similar class member pending or later permits a new state or federal court or other forum. All right. This case, the *Henson* case is a related action.

MR. ZOHDY:

May I say something — it's already named in there.

MR. PENDLEY:

Right. So as class counsel we have an obligation and we have been requested by Ciba to dismiss this action because the plaintiffs, the named plaintiffs in the *Henson* action are members of the class. And you know, you can't —

THE COURT:

Let me ask a question, we were here before on this case.

MR. PENDLEY:

You mean on this motion, on this rule?

THE COURT:

No, no, we were here on this case a while back, I can't remember when.

[5] MR. PENDLEY:

Yes, sir. I think, in fact, I've got the transcript —

THE COURT:

And it was something to do with the same, the same thing, the fact that there was an Alabama court having some hearings on the case —

MR. ZOHDY:

There was a motion to lift the stay.

THE COURT:

Right. You and Steve Irving —

MR. ZOHDY:

He was at that time.

THE COURT:

Okay. Now, let me ask you this, did your client opt out of the national —

MR. ZOHDY:

No, he didn't, sir. I mean, I don't know.

THE COURT:

That was a question that came up at the same time.

MR. PENDLEY:

They did not. All of these people are part of the class.

MR. ZOHDY:

Well, let me say this, Your Honor, that was not the issue at the time. At the time we were objecting —

THE COURT:

I remember there was a stay order by the —

MR. ZOHDY:

By Your Honor.

[6] THE COURT:

Correct.

MR. ZOHDY:

Okay. And then we filed a motion to lift the stay and then Your Honor denied our motion. So this case technically is a stayed case by Your Honor.

THE COURT:

At this point.

MR. ZOHDY:

So at this point there is no motion to lift that stay.

THE COURT:

All right. Let me ask you this, the fact that the national class that he didn't opt out in settled?

MR. ZOHDY:

Yes, Your Honor. We are not actually arguing against the *Price* case. We are not, we are attacking it.

THE COURT:

I understand that, but you want to continue this case even though the national class settled, am I — I'm just trying to get my bearings, is that correct?

MR. ZOHDY:

That's right. Certain Galecron claims, claims stems from exposure to Galecron we are fighting that issue at all. I mean it's named in the suit, I was one of the people who signed on the amendment for the settlement.

THE COURT:

[7] All right. So the claim as to that particular chemical —

MR. ZOHDY:

It's gone.

THE COURT:

— it's dead.

MR. ZOHDY:

With this —

THE COURT:

You have some more?

MR. ZOHDY:

Yes, Your Honor, look at the petition.

THE COURT:

You have some more chemicals?

MR. ZOHDY:

They named other chemicals in the petition. They named other claims in the petition. So it would be unfair for the people of this district just to dismiss the whole thing in lump sum.

THE COURT:

Let me ask you this, —

MR. ZOHDY:

Yes, Your Honor.

THE COURT:

— the Alabama settlement, did it include more than the Galecron?

MR. ZOHDY:

No, sir, only Galecron and Mr. Pendley can —

MR. PENDLEY:

That's right.

THE COURT:

That is it?

[8] MR. ZOHDY:

Yes, sir.

THE COURT:

So as far as this case is concerned I should only dismiss the Galecron claim –

MR. ZOHDY:

Yes, sir.

THE COURT:

— and the rest of it should remain alive?

MR. ZOHDY:

Yes, Your Honor.

THE COURT:

Mr. Pendley.

MR. PENDLEY:

Well, okay, Your Honor, in response what Mr. Zohdy says about the fact that the *Price* case encompasses only Chlordimeform/Galecron is absolutely true. That settlement is limited solely and purely to that chemical and that chemical only, and I think it is very clear from the settlement document that that is correct.

Now, and if the Court will look at the petition in this matter and particularly Paragraph 2 it talks about exposure to carcinogenic chemicals including but not limited to Chlordimeform/Galecron. I suggest to the Court that — the original petition, the original petition if Your Honor please, while it does, it talks about carcinogenic chemicals in the plural the only chemical in the original petition that is ever specifically identified is Chlordimeform or Galecron. And it is on that basis that we suggest [9] to the Court that this original petition was a Chlordimeform or Galecron case and should be dismissed.

Now Mr. Zohdy has asked me to look at the amended – I'm trying to get to it – I don't know, Judge, there may have been an amended —

MR. ZOHDY:

Your Honor, I think what happened in that case I filed some kind of an intervention —

THE COURT:

All right. Well, Judge, that is different, that is right. I have that right here.

MR. ZOHDY:

So at this time, Your Honor, Your Honor can dismiss Galecron, we have no fight with Galecron. However, we have other chemicals, we would like Your Honor to give us the opportunity probably to file a joint amendment of that petition dismissing any claim with respect to Galecron, deleting the Galecron reference, and if we have any other chemical that we're complaining of if Your Honor wants us to identify per se we can do that.

MR. PENDLEY:

Let me point this out, I'm looking at the petition for intervention and for class certification, this is the Kyle Moppert intervention by Mr. Kees. That is in here. But when the Court looks at the intervention you will see that, and starting with Paragraph 1, every paragraph talks about Chlordimeform.

Paragraph 2, exposure to chemical compound Chlordimeform. Three, carcinogenic insecticide Chlordimeform. [10] The intervention is purely and simply a Chlordimeform intervention.

MR. ZOHDY:

That's gone, Your Honor. That's already gone. They have the Moppert case, it went to the, I think it was the Eastern District of Louisiana, they filed a federal suit. That suit was joined and was consolidated with *Woodward vs. (inaudible)* and it's already settled.

THE COURT:

It is gone.

MR. PENDLEY:

That's settled too.

MR. ZOHDY:

So the only thing Your Honor —

THE COURT:

The only question I have to answer is whether or not the petition cites a cause of action for other chemicals other than —

MR. PENDLEY:

Chlordimeform.

Appendix L

THE COURT:

And I'm going to say it, looking on the face of the record and reading it very plainly it says: "During their employment at Ciba Geigy's Chlordimeform facility these individuals were exposed to toxic, noxious and carcinogenic chemicals including but not limited to —". Now, I'll do this, I'll dismiss any cause of action as to the Chlordimeform or Galecron and I will give him 30 days to amend.

MR. ZOHDY:

[11] Thank you, Your Honor. Your Honor, Mr. Pendley is class counsel with this one, we're going to have to file a joint amendment unless I'm going to have to fight and I don't want to fight anyone.

MR. PENDLEY:

No. We will try to deal with that, Judge.

MR. ZOHDY:

Thank you, Your Honor.

THE COURT:

You want to put that in evidence?

Appendix L

MR. PENDLEY:

Yeah, I want to put this into evidence, Your Honor, which is the stipulation mark it as Mover 1 and I'll substitute, I'll get my office to run it over.

THE COURT:

Court's adjourned.

(COURT ADJOURNED)

APPENDIX M — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED MARCH 31, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 94-0647-B-S

RUSSELL PRICE, ET AL., on behalf of themselves and others similarly situated,

Plaintiffs,

v.

CIBA-GEIGY CORPORATION, a corporation,

Defendant.

JUDGMENT

It is hereby ORDERED, ADJUDGED and DECREED that judgment is entered in accordance with the separate order entered March 31, 1995 approving the parties' Stipulation of Settlement and establishing the Findings of Fact and Conclusions of Law. The court shall retain jurisdiction with respect to future performance of, and any claims related to performance of, the Settlement agreement and judgment.

DONE this the 3d day of April, 1995, nunc pro tunc March 31, 1995.

s/ Charles R. Butler, Jr.
CHIEF DISTRICT JUDGE

Appendix M

JUDGMENT CERTIFYING THE SETTLEMENT CLASS AND APPROVING THE CLASS SETTLEMENT

This action came on for hearing before the Honorable Charles R. Butler on January 30, 1995 in regard to settlement class action issues under Fed. R. Civ. P. 23, and now this Court determines the issues related to the fairness of the proposed Stipulation of Settlement (Appendix A), having held hearings and received evidence as to whether the class should be finally certified pursuant to Fed. R. Civ. P. 23(b)(3) and whether the Stipulation of Settlement of this class action, as amended (Appendices B and C), should be approved by the Court pursuant to Fed. R. Civ. P. 23(e), and based on the attached memorandum opinion including findings of fact and conclusions of law, this Court concludes that: (1) the Court has subject matter jurisdiction over this class action, (2) the prerequisites for final class certification of the class as defined in the findings of fact are satisfied, (3) the terms of the Stipulation of Settlement as amended, are fair to the class as a whole pursuant to Fed. R. Civ. P. 23(e), (4) Class Counsel were qualified to represent the class and acted without conflict of interest, without collusion, and appropriately in negotiating the Stipulation of Settlement, and (5) the notice materials, the plan for and the actual dissemination of the notice satisfied the requirements of Fed. R. Civ. P. 23(c)(2) and (e) and the Due Process Clause of the United States Constitution.

IT IS HEREBY ORDERED AND ADJUDGED:

1. The requirements for certification of a settlement class having been satisfied, a settlement class is certified pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3). Those to whom the

notice provided in Fed. R. Civ. P. 23(c)(2) was directed and whom the Court finds to be members of the class are:

A. All persons who fall into one of the following categories, and who reside in the United States as of the date of filing of the Class Action Complaint, who have been exposed in the United States to Galecron® ("Exposed Persons"):

(1) *Plant Workers:* An individual (whether or not employed by Ciba-Geigy Corporation) who in the course of his or her employment at Ciba-Geigy Corporation's St. Gabriel, Louisiana or McIntosh, Alabama sites, was exposed to Galecron®, including, without limitation, individuals who worked in manufacturing, formulating or packaging Galecron® or in the waste disposal of Galecron®, or worked in the construction, demolition or maintenance of any facilities used for the foregoing activities at such St. Gabriel, Louisiana or McIntosh, Alabama sites; or

(2) *Formulators:* An individual (whether or not employed by Ciba-Geigy Corporation) who in the course of his or her employment was exposed to Galecron® while at a plant or site which was involved in mixing, blending, packaging, handling or otherwise formulating pesticides which contained, in whole or in part, Galecron®; or

(3) *Applicators:* An individual (whether or not employed by Ciba-Geigy Corporation) who in the course of his or her employment, was exposed to Galecron® while involved in the application of pesticides which contained, in whole or in part, Galecron®, including, without limitation, aerial and land applicators, flagmen, mixers, blenders, loaders and other individuals who handled such pesticide prior to or during the application process; and

(4) *Other Covered Workers:* An individual (whether or not employed by Ciba-Geigy Corporation) who in the course of his or her employment was exposed to Galecron® at the Clean Land, Air, Water Corporation or Environmental Purification Advancement, Inc. disposal sites located near Bayou Sorrel, Louisiana; at Empak, Inc. in Deer Park, Texas; or in a testing or research laboratory, whether or not owned by Ciba-Geigy Corporation. Appendix A at 10 (¶ I(S)) and 16 (¶ I(AM)).

B. The spouses, parents, children or other relatives of the Exposed Persons described above. Appendix A at 16 (¶ I(AM)).

C. The class does not include those persons listed in Appendix E attached hereto who timely requested exclusion from the class by December 16, 1994; provided, however, that such persons may become members of the class by filing with the Clerk of the Court a request to opt in within 60 days of receiving notice of the opportunity to rejoin the

class. The Settlement parties are hereby directed to submit to this Court for approval a form of notice to be provided to opt outs for such a purpose.

2. Notice satisfying Fed. R. Civ. P. 23(c)(2) and 23(e) has been provided and directed to the aforesaid class members as set forth in the affidavits of L. Thomas Styron, Wayne L. Pines, and Deana R. Jaeger, submitted at the hearing and incorporated by reference herein.

3. The class action Settlement in this case, appended hereto as Appendix A, amended by Appendices B, C and D, and incorporated by reference herein, is fair, adequate and reasonable under Fed. R. Civ. P. 23(a) and all objections to the Settlement are hereby overruled.

4. Under the terms of the Stipulation of Settlement, there are various instances of possible involvement by Class Counsel in the ongoing administration of the Settlement following final approval. During the first four years following final approval of the Settlement, present Class Counsel will perform such duties necessitated by their role as Class Counsel and by the terms of the Stipulation Settlement reasonable expenses of Class Counsel associated with their continuing work may be submitted to the DCA fund for payment. After that time, Class Counsel may properly petition the Court for substitution of counsel or may, at their discretion, continue to perform such duties as are necessary, billing the DCA fund at their current hourly rate for services rendered on behalf of the class.

5. Class Counsel, Timothy E. Eble, Charles W. Patrick, Jr., S.C. Middlebrooks, III, Patrick W. Pendley, and Jerry McKernan, are hereby authorized to communicate with class members for the purpose of fulfilling the goals of the medical monitoring program and to inform them of the terms of the Settlement. Further, Class Counsel is authorized to communicate with the class members who have opted-out in order to advise them of their limited "opt-in" right under this judgment.

6. This judgment together with the findings of fact and conclusions of law shall constitute the final judgment of this Court in this matter. The Court shall retain jurisdiction to determine attorneys' fees and expenses, and with respect to future performance of, and any claims relating to performance of, the Settlement agreement and judgment.

SO ORDERED this 31st day of March, 1995

s/ Charles R. Butler, Jr.
Charles R. Butler, Jr.
Chief District Judge

APPENDIX N — AMENDMENT TO PLAINTIFFS' ORIGINAL CLASS ACTION PETITION DATED SEPTEMBER 8, 1998

NO. 43,620 DIV.: D

18TH JUDICIAL DIST. COURT

PARISH OF IBERVILLE

STATE OF LOUISIANA

HURLEY HENSON, PHILIP HANO,
JOE BOWMAN, RANDALL SEVARIO,
SR., BETTY HANO, DAVID GRAY,
RANDALL SEVARIO, JR.

VERSUS

CIBA-GEIGY CORPORATION,
ROBERT BABB, EDEE TEMPLET,
KENNETH A. DEVUN

AMENDMENT TO PLAINTIFFS' ORIGINAL CLASS ACTION PETITION

NOW INTO COURT, through undersigned counsel, comes lead plaintiffs, Hurley Henson, a person of the full age of majority who respectfully moves this honorable court to grant him leave to amend his original petition representing that:

Appendix N

GENERAL

On August 8, 1998 this honorable court ordered that the plaintiff in this matter amend his original petition on basis of the following established facts:

1. that the court found that, Geigy workers' causes of action stems from their on the job exposure to the chemical substance Atrazine and chlordimeform as well as other chemicals as commercially known as Galecron, and their (Geigy Workers) contracting of Bladder Cancer, or any of the limited medical conditions has been settled as a result of the provision of stipulations included in the settlement of the federal class action entitled Russell Price, et. al v. Ciba Geigy, et. al. (CASE NO. 94-0647-CB-S Southern District of Alabama) (Price).

2. the court further orally ordered that the plaintiffs amend their original petition deleting all references to the settled matters (causes) in, and pursuant to, Price.

Wherefore, plaintiff Hurley Henson on behalf of himself and his family members as well as all putative class members, by counsel, submits the following in amendment to his original petition to read as follow:

Appendix N

Original Paragraph 1.

unchanged

Made defendants herein are the following:

1. CIBA-GEIGY CORPORATION, a foreign corporation authorized to do and doing business in the State of Louisiana who has appointed an agent for service of process in Louisiana to-wit: THE PRENTICE HALL CORPORATION SYSTEMS, INC., 203 Carondolet Street, Suite 811, New Orleans, Louisiana 70130;

2. ROBERT BABB, a person of the full age of majority who can be served at 3905 Highway 75, St. Gabriel, Louisiana 70776;

3. EDEE TEMPLET, a person of the full age of majority who can be served at 8872 Bayside Avenue, Baton Rouge, Louisiana 70806; and

4. KENNETH A. DEVUN, a person of the full age of majority who can be served at 3905 Highway 75, St. Gabriel, Louisiana 70776;

Each of whom are justly and truly indebted, jointly, severally, and in solido unto the class of plaintiffs herein in an amount which will reasonably compensate each class member for there personal injury, mental and emotional damage, economic loss, past, present and future medical expenses, punitive damages, and judicial interest from date of judicial demand until paid and for all cost of this litigation, for the following, to wit:

Appendix N

Original Paragraph 2.

Changed to read as follows

This class action is on behalf of Hurley Henson, Phillip Hano, Joe Bowman, Randall Sevrio, Sr., Betty Hano, David Gray, and Randall Sevario, Jr., and all other individuals who have worked at the Ciba-Geigy, St. Gabriel, Iberville Parish, Louisiana, Chemical Production Facilities, these individuals as well as their "immediate" family members were exposed to toxics, noxius, and carcinogenic chemicals including, but not limited to, Atrazin and Atrazine and chlordimeform as well as other chemicals.

Original Paragraph 3.

Unchanged

Plaintiffs, Hurley Henson, Phillip Hano, Joe Bowman, Randall Sevario, Sr., Betty Hano, David Gray, and Randall Sevario, Jr., worked at various times between 1975 and the present at Ciba-Geigy's Atrazine and chlordimeform as well as other chemicals facility in St. Gabreil, Iberville Parish, Louisiana. During their employment, the plaintiffs were employed by various contacting companies providing specialized services at the Ciba-Geigy plant in St. Gabriel, Iberville Parish, Louisiana. These services were not part of the trade business or occupation of Ciba-Geigy as defined in *Berry v. Holston Well Service, Inc.*, 488 So. 2d 934 (La. 1986).

Appendix N

Original Paragraph 4.

Changed to read as follows

During their employment at the Ciba-Geigy plant, plaintiffs, Hurley Henson, Phillip Hano, Joe Bowman, Randall Sevario, Sr., Betty Hano, David Gray, and Randall Sevario, Jr., as well as their family members, together with other class members, were exposed to various toxic and carcinogenic chemicals, including, but not limited to, Atrazine and chlordimeform as well as other chemicals and atrazine. Plaintiffs' Hurley Henson, Phillip Hano, Joe Bowman, Randall Sevario, Sr., Betty Hano, David Gray, and Randall Sevario, Jr., and all other class members' exposure to these noxious and carcinogenic chemicals were a substantial contributing causes to their injuries and damages as described herein. Plaintiff Hurley Henson further submits that workers causes of action (only) for their direct exposure to Atrazine and chlordimeform as well as other chemicals as commercially known as Galecron has been settled to the extent permitted by law and for all medical conditions as defined and included in the Price settlement.

Original Paragraph 5.

Changed to read as follows

As a result of such exposures, the plaintiffs, and all other class members, are at a substantial increased risk of developing severe, debilitating, and incurable occupational diseases, none occupational diseases, to include, but not limited to, bladder cancer, kidney cancer, transitional cell

Appendix N

carcinoma, sarcomas, leukemias, lymphomas, disorders of the hematopoietic system, disorder of lymphatic system, hemorrhagic cysittis, damage to the heart muscles and kidney muscles, heart attacks, heart and kidney failure, stomach cancer, brain cancer, diseases of the circulatory system, and hematuria. These diseases will result in debilitating and excruciating pain. These diseases lead to the death of number of workers as well as their family members.

Original Paragraph 6.

Changed to read as follows

These occupational diseases as well as none occupational diseases, are not readily discoverable by the plaintiffs without adequate medical monitoring and screening. The early detection of these malignant conditions are essentially the only chance the plaintiffs and/or contributed to by their exposure to the noxious and carcinogenic chemicals, including, but not limited to, Atrazine and Atrazine and chlordimeform as well as other chemicals, while they were working at the Ciba-Geigy chemical production facilities in St. Gabreil, Louisiana.

Original Paragraph 7.

Changed to read as follows

Plaintiffs and other class members have suffered loss of earning capacity and/or lost wages and have obligated to incur, and will incur in the future, expenses amounting to considerable sums of money for medical and hospitalization

Appendix N

care and related expenses, all in which were caused and/or contributed to by their exposure to the noxious and carcinogenic chemicals, including, but not limited to, Atrazine and chlordimeform as well as other chemicals, while they were working at the Ciba-Geigy chemical production facilities in St. Gabriel, Louisiana.

Original Paragraph 8.

Changed to read as follows

Defendants, Ciba-Geigy Corporation, Robert Babb, Edee Templet and Kenneth A. Devun, knew or should have known, that the chemicals they prepared, manufactured, distributed, sold, handled, transported, and/or used were delictus, poisonous, carcinogenic, and highly harmful to the body and health of the plaintiffs and all other class members. Notwithstanding this, defendants, with conscious indifference to the well being of the plaintiffs and all other class members, failed to take even the slightest care, failed to take any reasonable precaution or to warn plaintiffs and all other class members of the danger and harm to which they were exposed and transmitted to other class members while handling and working in close proximity to noxious and carcinogenic chemicals located at the defendant, Ciba-Geigy's, St. Gabriel facility, including, but not limited to, Atrazine, Atrazine and chlordimeform as well as other chemicals and/or Atrazine and chlordimeform as well as other chemicals metabolites.

Appendix N

Original Paragraph 9.

Changed to read as follows

Defendants knew or should have known that the chemicals they prepared, manufactured, distributed, sold, handled, transported, and/or used were delictus, poisonous, carcinogenic, and highly harmful to the plaintiffs' and all other class members' bodies and health and that the plaintiffs and all other class members would not know of these dangerous propensities. Notwithstanding this defendants, with conscious indifference to the well being of the plaintiffs and all other class members, wholly failed and omitted to provide the plaintiffs and other class members with sufficient wearing apparel and proper protective equipment, or with appliances to protect themselves from being poisoned and injured by exposure to such chemicals. Defendants further failed to take the proper measures to assure the workers none transmittals of the residue of said chemicals to their immediate family members class members herein.

Original Paragraph 10.

Changed to read as follows

Defendants, knew or should have known, that the chemicals, including, but not limited to, Atrazine, Atrazine and chlordimeform as well as other chemicals and/or Atrazine and Atrazine and chlordimeform as well as other chemicals metabolites, were delictus, poisonous, carcinogenic, and highly harmful to the plaintiffs' and all other class members' bodies and health. Notwithstanding this, defendants with

Appendix N

conscious indifference to the well being of the plaintiffs and all other class members, manufactured, processed, formulated, stored, transported, and/or used these chemicals so that in their ordinary handling, the plaintiffs and all other class members would come into contact with and would be injured by these delictus and highly harmful carcinogenic compounds.

Original Paragraph 11.

Changed to read as follows

Defendants, knew or should have known, that the chemicals, including, but not limited to Atrazine, Atrazine and chlordimeform as well as other chemicals and/or Atrazine and Atrazine and chlordimeform as well as other chemicals metabolites, were delictus, poisonous, carcinogenic and highly harmful to the plaintiffs' and all other class members' bodies and health. Notwithstanding this, defendants with conscious indifference to the well being of the plaintiffs and all other class members, wholly failed to take even the slightest care to warn the plaintiffs or other class members of said danger and/or to instruct the plaintiffs or other class members in the proper handling of the chemicals or to take any care to protect the plaintiffs and/or other class members from harm and wholly failed to take the slightest care to adopt and enforce a safe plan and method of handling and working near the chemicals.

Appendix N

Original Paragraph 12.
unchanged

Defendants with conscience indifference to the well being of the plaintiffs and all other class members, failed to take even the slightest care in discharging their duty to examine available research material, complied by experts, pertaining to the dangerous nature of the chemicals and act therein to render their use and handling by the plaintiffs and all other class members, as safe as could be reasonably done under the circumstances prior to subjecting the plaintiffs and all other class members to exposure to the chemicals.

Original Paragraph 13.

Changed to read as follows

Plaintiffs and all other class members would further show that at all material times, mentioned herein, the defendants were fully aware of their chemical emissions and that said defendants released toxic chemicals into the ambient air and water knowing that such contaminants would be inhaled and/or ingested by persons such as the plaintiffs and other class members. Plaintiffs and all other class members would further show that defendants actually or constructively knew, or should have known, that their chemicals had the potential for causing cancer and/or chronic diseases that could result in death or serious bodily injury, including the diseases of transitional cell carcinoma, bladder cancer, kidney cancer, leukemia, lymphoma, disorders of the hemorrhagic system, disorders of lymphatic system, sarcomas, hemeragic cystitis and hematuria among other diseases as enumerated herein.

Appendix N

Original Paragraph 14.

Unchanged

Plaintiffs and all other members would further show that at all material times mentioned herein, the defendants were fully aware of their chemical emissions and that said defendants released toxic chemicals into the ambient air and water knowing that such contaminants would be inhaled and/or ingested by persons such as the plaintiffs and other class members. Defendants further show that the defendants, actually or constructively knew, or should have known, that adequate medical monitoring and screening was required in order to protect the plaintiffs' and other class members' good health. Additionally, plaintiffs would show that the defendants knew, or should have known that such medical monitoring and/or screening was essential for the early detection of a malignant condition and/or adverse health effects associated with exposure to this chemical was essentially the only chance that the plaintiffs and/or other class members would have for a cure and/or survival.

Original paragraph 15.

Changed to read as follows

Plaintiffs would further show that the defendants are jointly and separately liable for the bodily harm as well as property damages suffered by the plaintiffs and/or other class members, which resulted from such emissions and which such emissions are the producing or proximate cause. Plaintiffs and all other class members would further show

Appendix N

that the aforesaid diseases causing contaminants contained such chemicals constituted abnormally hazardous substances and ultra hazardous substances and were unreasonably dangerous per se.

Original Paragraph 16.

Unchanged

Plaintiffs and all other members would further show that the defendants were negligent in failing to warn the plaintiffs and other class members, and other similarly situated of the release of these carcinogenic chemicals including, but not limited to Atrazine and chlordimeform as well as other chemicals and/or Atrazine and chlordimeform as well as other chemicals metabolites, and other toxic and carcinogenic chemicals. Defendants had a duty to warn the plaintiffs and all other class members of the presence of the toxicological properties of these noxious materials.

Original Paragraph 17.

Changed to read as follows

Defendants were also negligent in their failure to test the environment to establish the concentration of these toxic and carcinogenic chemicals in the breathing zone of the plaintiffs and/or all other class members. Defendants further failed to test the soil and drinking waters as well as the surrounding environment to their production plant located at St. Gabriel Louisiana, as well as other production facilities located in the surrounding areas.

Appendix N

THEORY OF RECOVERY AGAINST DEFENDANTS BASED UPON DEFENDANTS' FAILURE TO USE ALTERNATE PRODUCTS OR DESIGNS

Original Paragraph 18.

Unchanged

Defendants' products were unreasonably dangerous because of their design for the following reasons:

(a) As the manufacturers of potentially dangerous products, defendants were held to the knowledge of experts. They were required by the law to keep abreast of scientific knowledge, discoveries and advances and are presumed to know what is imparted thereby. Defendants also had a duty to test and inspect their products to that extent the research and experiments must have been commensurate with the dangers involved, all of which they failed to do.

(b) Even if a reasonable person would conclude that the danger in fact of the defendants' products did not outweigh the utility of those products there were feasible ways to design defendants' products with less harmful consequences. Defendants are held to the standard and skill of experts and should have been aware of the feasibility and of the utilization of these alternate designs, yet they failed to do so.

Appendix N

(c) Even if a reasonable person would not conclude that the danger in fact of the defendants' products did rot outweigh the utility of those products, defendants, held to the standard and skill of experts, should have reasonably known of the dangers inherent to the use of Atrazine and chlordimeform as well as other chemicals and/or Atrazine and chlordimeform as well as other chemicals metabolites and could have feasible utilized alternate designs with less harmful consequences, which they failed to do.

THEORY OF RECOVERY AGAINST THE DEFENDANTS BASED UPON THEIR FAILURE TO WARN

Original Paragraph 19.

Changed to read as follows

Defendants failed to adequately warn the plaintiffs and other class members concerning all dangers relative to the way their products were designed. Specifically, defendants failed to provide the plaintiffs and other class members with adequate warning of the dangers inherent in the normal use of their products which were not within the knowledge of or obvious to the ordinary user of those products. These dangers include the fact that the defendants' product were highly dangerous to the health of persons exposed to them in that they caused or contributed to the development of bladder cancer and a wide variety of other cancers in adverse health affects. Additionally, defendants failed to provide the

plaintiffs and other class members with knowledge as to what would be reasonably safe and sufficient wearing apparel or handling of same and the proper protective equipment and appliances as well as the proper measures of handling same, if the truth, there was any, to protect them from being poisoned, disabled, and killed as a result of their exposure to and/or use of defendants' products. Further, defendants failed to instruct the plaintiff and/or other class members as to the proper and safe use of their products, if such products could ever be safely used

Original Paragraph 20.

Changed to read as follows

Subsequent to the time that the defendants caused their Atrazine and Atrazine and chlordimeform as well as other chemicals and/or Atrazine and Atrazine and chlordimeform as well as other chemicals metabolites, as well as other chemicals, to be stored, manufactured, sold, transported, handled, marketed and/or distributed and placed where the plaintiffs and/or other class members, would be exposed to them, the defendants continued to acquire additional knowledge of the dangers caused by their product. This increased knowledge included the knowledge that exposure to even a small amount of Atrazine and Atrazine and chlordimeform as well as other chemicals and/or Atrazine and Atrazine and chlordimeform as well as other chemicals metabolites would cause serious and permanent injury. Nonetheless, the defendants have negligently and recklessly failed and refused to warn and advise plaintiffs and other class members of the dangers caused by their past exposure

to the defendants' defective products, which they had reason to know were in place on plaintiffs' and other class members' work site and was transported to their homes, and in the plaintiffs' and other class members' breathing zone during off-hours and have refused to warn and advise of the dangers caused by their products to the health and welfare of persons coming into contact and breathing such products even years after they have been exposed to them. Despite the defendants' knowledge that Atrazine and chlordimeform as well as other chemicals had contaminated the environment where the plaintiffs and other class members were required to work and live, even in the present time. The defendants possessed with information uniquely available to them relating to the dangerous effects of continued exposure to Atrazine and Atrazine and chlordimeform as well as other chemicals, have refused or neglected to provide such information to the plaintiffs and other class members, or to the public at large. Defendants have deliberately, intentionally and purposely withheld such information from the plaintiffs and other class members thus denying them the knowledge with which to take necessary safe precautions, such as medical examinations or avoiding further exposure to Atrazine and Atrazine and chlordimeform as well as other chemicals, the carcinogenic effects of which defendants have longed since learned, specifically, even to the present time, the defendants have absolutely failed to warn persons such as the Plaintiffs and/or other class members, who defendants knew were likely exposed to their Atrazine and Atrazine and chlordimeform as well as other chemicals, of the need of continued and regular health monitoring due to prior Atrazine and chlordimeform as well as other chemicals and/or Atrazine and chlordimeform as well as other chemicals metabolites exposure; defendants have intentionally delayed the use of warning on their Atrazine and

Appendix N

chlordimeform as well as other chemicals and failed to advise plaintiffs and other class members exposed to their product in the past, of the medical findings known to the defendants concerning the dangers of Atrazine and chlordimeform as well as other chemicals exposure; defendants have suppressed the dissemination of information to the plaintiffs and other class members and falsely represented facts to the plaintiffs and other class members concerning the dangers of present and past exposure to Atrazine and chlordimeform as well as other chemicals. Defendants' failure to warn and intentional misrepresentations took place before, during, and after the plaintiffs and other class members were exposed to Atrazine and chlordimeform as well as other chemicals which the defendants manufactured. Defendants breech of their post-sale duty to warn plaintiffs and other class members of the dangers posed by the exposure to the defendants' Atrazine and chlordimeform as well as other chemicals was the proximate cause or a substantial contributing cause to the plaintiffs' and/or class members cancers and/or other ill health affects and the resulting damages therefrom.

Appendix N

THEORY OF RECOVERY AGAINST DEFENDANTS BASED UPON THE MANUFACTURING AND SUPPLYING OF PRODUCTS WHICH WERE UNREASONABLY DANGEROUS PER SE

Original Paragraph 21.

Unchanged

Although the defendants' products were unreasonably dangerous because of their defective design and because of the defendants' failure to warn, even if the risk of the hazards related to the use of the defendants' product were not discoverable under existing technology at the time they were designed and marketed, defendants' products were unreasonably dangerous *per se* because of the inherent dangerous characteristics of those products, including their inherent dangerous construction, composition and design. Whether or not the defendants actually perceived or could have perceived the dangers of their products at the time they were designed and marketed, a reasonable person would conclude that the danger in fact of those products, whether foreseeable or not, actually outweighed the benefit which flowed from their use.

Appendix N

THEORY OF RECOVERY AGAINST THE DEFENDANTS FOR INTENTIONAL AND WILLFUL CONDUCT

Original Paragraph 22.

Unchanged

With conscience indifference and disregard for the safety of the plaintiffs and other class members who were exposed to the products which the defendant manufactured, advertised, handled, formulated, marketed, transported, stored, and/or sold, the defendants acted through their servants, employees, representatives, and agents, placed their products on the market to be purchased and used by the public when defendants knew that exposure to or use of their Atrazine and chlorodimeform could and would cause severe personal injury and cancer to the plaintiffs and other class members exposed to the products.

Original Paragraph 23.

Changed to read as follows

Defendants, at all times hereto mentioned, knew that their Atrazine and chlorodimeform and the component parts and accessories thereof, were defective, and that defendants, individually, intentionally, willfully, and knowingly placed them on the market when they knew that their products would be handled by or used in the vicinity of persons such as the plaintiffs and/or other class members who had absolutely no knowledge of the dangers involved.

Appendix N

Original Paragraph 24.

Unchanged

Defendants implicity represented by placing their products on the market, that their products could safely be used for the purposes for which they were manufactured and could safely be used and handled by individuals and/or employees of various industries.

Original Paragraph 25.

Changed to read as follows

In research, testing, manufacturing, distributing, labeling and marketing their product, defendants did so with conscious disregard for the safety of the users of those products in that the defendants had specific prior knowledge that there was a high risk of injury or death resulting from exposure to or use of their product, including, but not limited to bladder, kidney, stomach, liver, and other forms of cancers and other ill health effects. This knowledge was obtained, in part, from scientific studies and medical data to which the defendants had access and knowledge. Despite their knowledge of the dangers involved, defendants continued to manufacture and distribute their products without attempting to protect users from or warn users of the high risk of injury and/or death resulting from exposure to their product.

Appendix N

Original Paragraph 26.

Unchanged

Defendants' intentional misconduct was motivated by their financial interest in the continuing uninterrupted distribution and marketing of their products. In pursuit of this financial motivation, defendants with a willful, wanton and conscious disregard for the safety of the users of their products, and were, in fact, consciously willing to permit their products to cause injury to persons, such as the plaintiffs and other class members, whom they knew were or would be in exposed to their products without having any idea of the risk involved.

Original Paragraph 27.

Changed to read as follows

Prior to placing their defective products on the market, defendants knew and possessed medical and scientific data and other knowledge that clearly indicated that Atrazine and chlordimeform as well as other chemicals were hazardous to the health and safety of individuals exposed to it, such as the plaintiffs and other class members. Defendants had specific prior knowledge that there was a high risk of injury or death resulting from exposure to Atrazine and chlordimeform as well as other chemicals including, but not limited to, the development of leukemia, lymphoma, bladder cancer, kidney cancer, transitional cell carcinoma, sarcoma, disorders of the hemopoietic system, disorder of the lymphatic system, hemorrhagic cystitis, cystitis and other adverse health effects

Appendix N

and/or other forms of cancer. This knowledge was obtained, in part, from scientific studies and medical data to which the defendants had access, as well as scientific studies performed by, at the request of, or at the insistence of the defendants. With the intent to deceive the plaintiffs and/or other class members, and with the intently should remain ignorant of such medical and scientific data and with further intent to induce the plaintiffs to alter their medical position regarding their injuries and/or risk, and in order to gain an advantage, the defendants committed the following acts of fraudulent concealment:

(a) Defendants did deliberately cause to be suggested as a fact to the plaintiffs and other class members, by not placing warning labels on their products, that it was safe for the plaintiffs and other class members to use or work in close proximity with such materials;

(b) Defendants deliberately concealed the hazardous nature of their product from the plaintiffs and other class members by concealing the fact that Atrazine and chlordimeform brings pathological effects without noticeable trauma, when defendants were possessed with knowledge that such materials were dangerous and a threat to the health of persons coming in contact therewith and had a duty to disclose such fact to the plaintiffs and other class members;

(c) Defendants deliberately failed to provide the plaintiffs and other class members with or even

recommend the use of respirators or other protective devices when they were required to use or when they would be exposed to defendants' products even though defendants knew that such protective measures were necessary, and had a duty to advise plaintiffs and other class members that, if such protective devices were not used, it would result in injury and/or death;

(d) Defendants deliberately concealed from the plaintiffs and other class numbers the true nature of their exposure to their products, in that defendants knew the true nature of their exposure to their products, in that defendants knew that the plaintiffs and other class members, upon exposure to Atrazine and chlordimeform as well as other chemicals would in time develop cancers to include bladder cancer, kidney cancer, leukemia, lymphoma, disorders of transitional cell carcinoma, sarcomas, and would immediately be in danger of ill health, possible death, and concealed the fact that the plaintiffs and other class members had in fact been exposed to harmful materials contained in their products and concealed the fact that the material to which the plaintiffs and other class members were exposed would cause pathological effects without noticeable trauma;

(e) Defendants deliberately failed to provide medical and scientific information to the public at large as to the true nature of the hazards associated with Atrazine and chlordimeform as well as other

chemicals and actively concealed such known medical and knowledge from the public and the plaintiffs and/or other class members until they were forced to disclose such information by the Environmental Protection Agency;

(f) The aforementioned fraudulent concealment by defendants of the true nature of the hazards resulting from exposure to the Atrazine and chlordimeform as well as other chemicals contributed causing the plaintiffs and/or other class members to develop cancers and other ill harm effects.

(g)

THEORY OF RECOVERY AGAINST THE DEFENDANTS AS A RESULT OF THEIR INTENTIONAL ACTS

Original Paragraph 28.

Unchanged

On information and belief defendants were responsible to provide the plaintiffs and other class members with proper supervision, safety instruction, and warnings concerning the hazardous conditions in the work place, and generally to provide the plaintiffs and other class members with a safe work place reasonably necessary to protect the life, health, safety, and welfare of the plaintiffs and other class members.

Appendix N

Original Paragraph 29.

Changed to read as follows

Robert Babb, Edee Templett, and Kenneth A. Devun, in their capacity as design engineer, plant manager, safety and health managers for Ciba-Geigy, actually undertook to perform the following duties:

(a) Inspection, approval and supervision of the work of the plaintiffs and other class members;

(b) To see that proper safety rules were adopted, promulgated and enforced concerning the use of respiratory protection devises;

(c) To see that the plaintiffs and other class members his co-workers performed their duties pertaining to their work in a proper, safe, and workman-like-manner;

(d) To see that the plaintiffs and other class members used safe and sound principles and practices in their work;

(e) To make health and hygiene decisions on any and all questions regarding the use of respiratory protection devices;

(f) To keep abreast of state of the art knowledge as it is pertained to the dangers associated with exposure to Atrazine and chlordimeform as well as other chemicals;

Appendix N

(g) To provide adequate physical examinations, safety equipment, ventilation and breathing apparatuses, where such were necessary in order to prevent the plaintiffs and other class members from being harmed by exposure to Atrazine and chlordimeform as well as other chemicals in the environment which the plaintiffs and other class members were required to work;

(h) To make certain that employees, including the plaintiff and other class members, were provided a safe working and living environment free from Atrazine and chlordimeform as well as other chemicals;

(i) To comply with applicable State and Federal regulations regulating work place exposure to Atrazine and chlordimeform as well as other chemicals including, but not limited to those regulations promulgated by the U.S. Department of Labor pursuant to the Walsh/Healy Act and the Occupational Safety and Health Act; and

(j) To provide plaintiffs and other class members with a safe place to work.

Appendix N

Original Paragraph 30.

Unchanged

Not only did Robert Babb, Edee Templet, and Kenneth A. Devun have the duties and responsibilities set forth in the foregoing paragraphs above, but they actually undertook on an operational basis to perform duties and fulfill those responsibilities, and they intentionally failed to carry out those undertakings and assumed in a manner asserted in paragraph 26.

Original Paragraph 31.

Changed to read as follows

On information and belief, Robert Babb, Edee Templet and Kenneth A. Devun knew of the presence of Atrazine and chlordimeform as well as other chemicals and/or Atrazine and chlordimeform as well as other chemicals metabolites within the working environment in which the plaintiffs' and other class members were required to work and knew, or should have known, that the dangers to the plaintiffs and other class members' health from working and living in an environment polluted with Atrazine and chlordimeform as well as other chemicals without proper protection. Plaintiffs and other class members aver that Robert Babb, Edee Templet, and Kenneth A. Devun knew, or should have known, that cancers and/or other ill health effects would have been avoided by the use of adequate safety equipment and measures.

Appendix N

Original Paragraph 32.

Changed to read as follows

On information and belief, Robert Babb, Edee Templet and Kenneth A. Devun intentionally failed to perform their responsibilities and/or actual undertaking to provide the plaintiffs and other class members with a safe place to work in the following particulars:

(a) Intentionally failing to provide periodic medical examinations to the plaintiffs;

(b) Intentionally failing to properly ventilate the area in which the plaintiffs were required to work;

(c) Intentionally failing to provide safety appliances, including, but not limited to respirator, air-fed hoods, gloves, protective clothing, etc., for the plaintiffs' use;

(d) Intentionally failing to institute safety procedures and plans for the adequate protection of the plaintiffs;

(e) Intentionally failing to warn the plaintiffs of the dangers posed by the polluted atmosphere in which they were required to work including, but not limited to the risk of cancer and the carcinogenic effects caused by exposure to Atrazine and chlordimeform as well as other chemicals;

Appendix N

(f) Intentionally failing to enforce applicable safety rules after such rules were actually adopted;

(g) Intentionally failing to keep abreast of scientific and engineering knowledge regarding the dangers of, and protection against, occupational exposure to Atrazine and chlordimeform as well as other chemicals;

(h) Intentionally failing to properly supervise operations;

(i) Commencing and continuation of operations which were under their control and supervision when they knew, or should have known, that such operations would cause the plaintiffs and other class members to be exposed to Atrazine and chlordimeform as well as other chemicals, without protection, on a daily basis;

(j) Intentionally failing to abide by applicable State and Federal regulations pertaining to work place exposure to Atrazine and chlordimeform as well as other chemicals including, but not limited to those regulations promulgated by the U.S. Department of Labor and the Occupational Safety and Health Acts;

(k) Intentionally failing to measure the levels of Atrazine and chlordimeform as well as other chemicals in the plaintiffs' work environment;

Appendix N

(l) Intentionally misleading the plaintiffs as to the true nature of their health problems;

(m) Other intentional acts which may be discovered subsequent to the filing of this class action and/or may be proven at the time of trial.

Original Paragraph 33.

Unchanged

The aforementioned intentional acts of Robert Babb, Edee Templet, and Kenneth A. Devun were substantial contributing factors in causing the damages suffered by the plaintiffs and other class members. Other class members, to include but not limited to leukemia, lymphoma, bladder cancer, kidney cancer, disorders of the hemopoietic system, disorder of the lymphatic system, transitional cell carcinoma, sarcoma, hemorrhagic cystitis, and cystitis and/or other ill health effects.

THEORY OF RECOVERY AGAINST CIBA-GEIGY AND ITS EXECUTIVE OFFICERS BASED UPON INTENTIONAL MISCONDUCT

Original Paragraph 34.

Changed to read as follows

Defendants, Ciba-Geigy and its executive officers exposed the plaintiffs and other class members to Atrazine and chlordimeform as well as other chemicals at Ciba-Geigy's

Appendix N

Iberville Parish facility from approximately 1975 until present. At all times relevant hereto, defendants were aware or should have been aware of the dangers inherent in exposure to Atrazine and chlordimeform as well as other chemicals. The defendants possessed medical and scientific data along with other knowledge, which clearly indicated that Atrazine and chlordimeform as well as other chemicals were hazardous to the health and safety of its employees, including plaintiffs and other class members herein, who were required to work and live in close proximity to Atrazine and chlordimeform as well as other chemicals.

INTENTIONAL TORT OF FRAUDULENT MISREPRESENTATION CAUSING PHYSICAL HARM

Original Paragraph 35.

Changed to read as follows

Ciba-Geigy and their executive officers had a duty to disclose and/or properly represent to the plaintiffs and/or other class members, the dangers associated with working with, and or transmittals of residues, of Atrazine and chlordimeform as well as other chemicals, the risk associated with the working at a work place polluted with Atrazine and chlordimeform as well as other chemicals, and the true medical condition of the plaintiffs and other class members as a result of working around Atrazine and chlordimeform as well as other chemicals. Yet, the defendants did not disclose to the plaintiffs any or all of this information and/or fraudulently misrepresented any and all of this information to the plaintiffs and/or other class members.

Appendix N

Original Paragraph 36.

Unchanged

Because of the fraudulent misrepresentation and/or non-disclosure by the defendants, the plaintiffs and/or other class members justifiably went to work and relied on the misconception that they were not being harmed by exposure to Atrazine and chlordimeform as well as other chemicals.

Original Paragraph 37.

Unchanged

As a result of the plaintiffs' and other class members' justifiable reliance upon the defendants' nondisclosure and/or fraudulent misrepresentation, plaintiffs and/or other class members, contracted leukemia, lymphoma, bladder cancer, kidney cancer, disorders of the hemopoietic system, disorders of the lymphatic system, transitional cell carcinoma, sarcoma, hemorrhagic cystitis, and cystitis and/or other ill health effects.

Original Paragraph 38.

Unchanged

The foregoing described nondisclosure and/or fraudulent misrepresentations, constitutes deceit and makes the defendants liable to the plaintiffs and all other class members for damages for the damages caused as a result of their exposure to Atrazine and chlordimeform as well as other chemicals.

Appendix N

Original Paragraph 39.

Unchanged

The defendants knew that to a reasonable degree of certainty that consequences are substantially certain to result from the aforementioned acts, but the defendants, with full knowledge of this, continued to go ahead with their fraudulent misrepresentations and concealment with their fraudulent misrepresentation and concealment of the true hazards associated with exposure to Atrazine and chlordimeform as well as other chemicals; as a result, the defendants are treated by law as if they in fact desired to make the plaintiffs and/or other class members sick.

THEORY OF RECOVERY BASED UPON AN INTENTIONAL TORT OF BATTERY

Original Paragraph 40.

Changed to read as follows

As described in the foregoing paragraphs, defendants failed to enlighten, educate, or share their knowledge with their employees, including plaintiffs and other class members, regarding the dangerous propensities of Atrazine and chlordimeform as well as other chemicals. Thus, plaintiffs and other class members were completely unaware of the dangerous propensities of Atrazine and chlordimeform as well as other chemicals; plaintiffs and other class members were not aware of the ill health effects which inevitably would result from Atrazine and chlordimeform as well as other

Appendix N

chemicals exposure. Therefore, although the plaintiffs and other class members went to work voluntarily, they were unaware of their exposure to Atrazine and chlordimeform as well as other chemicals, the danger of which the defendants were fully aware. Thus, plaintiffs and/or other class members did not voluntarily subject themselves to dangers and ill health problems associated with exposure to Atrazine and chlordimeform as well as other chemicals.

Original Paragraph 41.

Changed to read as follows

Thus, defendants intentionally exposed plaintiffs and other class members to Atrazine and chlordimeform as well as other chemicals without the plaintiffs' and/or other class members' consent. Any consent to work by the plaintiffs and/or any other class member were vitiated by the defendants' concealment of scientific, medical and other data indicating the dangers of Atrazine and chlordimeform as well as other chemicals exposure. Such unconsented exposure constituted an intentional infliction of harm, offensive conduct and/or the invasion of the bodily integrity of the plaintiffs and/or other class members without the plaintiffs' or other class members' consent thereby constituting the intentional tort of battery.

Appendix N

Original Paragraph 42.

Changed to read as follows

As a result of the aforementioned battery, the defendants are liable unto the plaintiffs and all other class members for all damages, foreseen and unforeseen, suffered by the plaintiffs or other class members as a result of their exposure to Atrazine and chlordimeform as well as other chemicals.

Original Paragraph 43.

Changed to read as follows

In addition to fraudulent misrepresentation causing physical harm and battery, defendants committed the following intentional acts which caused the plaintiffs and/or other class members to suffer ill health effects as a result of their exposure to Atrazine and chlordimeform as well as other chemicals;

(a) Intentionally failing to provide necessary protection to plaintiffs;

(b) Intentionally failing to provide safety equipment as required by safety statutes;

(c) Intentionally failing to provide clean, respirable air, and proper ventilation;

(d) Intentionally failing to provide proper medical monitoring;

Appendix N

(e) Intentionally failing to monitor the extent and output of Atrazine and chlordimeform as well as other chemicals into the work place;

(f) Intentionally failing to warn the plaintiffs and other workers of the dangers associated with Atrazine and chlordimeform as well as other chemicals;

(g) Intentionally inducing the plaintiffs and other workers to work in a work place polluted with Atrazine and chlordimeform as well as other chemicals;

(h) Intentionally failing to keep Atrazine and chlordimeform as well as other chemicals output in the work place at safe levels, and allowing the transmittal of same to the workers homes and other.

Original Paragraph 44.

Changed to read as follows

By committing the foregoing acts, the defendants consciously desired that the plaintiffs suffer a Atrazine and chlordimeform as well as other chemicals induced disease. Moreover, as a result of these acts, defendants knew that it was substantially certain that the plaintiffs and/or other class members would suffer Atrazine and chlordimeform as well as other chemicals diseases including, but not limited to bladder cancer, leukemia, lymphoma, kidney cancer, disorders of the hemopoietic system, disorders of the lymphatic system, transitional cell carcinoma, sarcoma, hemorrhagic cystitis, and cystitis.

Appendix N

THEORY OF RECOVERY AGAINST THE DEFENDANTS BASED UPON INTENTIONAL TORT OF OUTRAGE

Original Paragraph 45.

Changed to read as follows

The aforedescribed negligent and intentional acts committed by these defendants in their failure to disseminate medical and scientific information concerning the true nature of the hazards associated with exposure to Atrazine and chlordimeform as well as other chemicals; together with, their knowledge that the plaintiffs and/or other class members were required to work and live in an environment polluted by Atrazine and chlordimeform as well as other chemicals manufactured, marketed, formulated, stored, sold, transported and/or distributed by them, is so egregious as to shock the conscience of the reasonable man and the public at large thereby constituting the intentional tort of outrage.

EXEMPLARY DAMAGES

Original Paragraph 46.

Changed to read as follows

In addition to general and special damages, plaintiffs and/or other class members are entitled to an award of exemplary damages as a result of injuries which were caused by the defendants' willful, wanton, reckless and/or intentional disregard for their safety and the public safety in their storage,

Appendix N

handling, manufacturing, formulating, marketing, transporting and/or storage of dangerous and carcinogenic chemical, including, but not limited to Atrazine and chlordimeform as well as other chemicals and/or Atrazine and chlordimeform as well as other chemicals metabolites, and various other toxic and carcinogenic chemicals and hazardous toxic substances as described above. Plaintiffs therefore request that exemplary damages, in an amount which the evidence may show proper at the time of trial, be awarded to the plaintiffs and against the defendants, jointly, individually and in solido.

DAMAGES SUSTAINED BY PLAINTIFFS

Original Paragraph 47.

Unchanged

Plaintiffs and all members of the class have suffered irreparable harm and damages as a result of the defendants' unlawful and wrongful conduct.

CLASS ACTION

Original Paragraph 48.

Changed to read as follows

Plaintiffs are entitled to have this caused action maintained as a class action, pursuant to the Louisiana Code of Civil Procedure, Article 591, et seq., for the following reasons:

(a) The persons or entities constituted in the class are so numerous that the individual joinder of all parties is impractical;

(b) There exist a common character among the rights sought to be enforced among the class representatives in the unknown members of the class;

(c) The named plaintiffs or representatives of the class and members of the class are so situated as to provide adequate representation for the unknown class members;

(d) The great majority of the unnamed class members have no substantial interest in individually controlling the prosecution of their suffered action;

(e) There are common questions and issues of law and fact involved in this matter which predominate over questions affecting individual class members;

(f) Any defense or theories of resistance of liabilities set forth by the defendants will be applied to all claims presented by all members of the class;

(g) Prosecutions and suffered actions by individual class members which create a serious risk of inconsistency of varying adjudications which may prejudicially affect the claims of other class members in subsequent litigation;

(h) The prosecution of suffered actions by individual class members possesses the risk that suffered adjudication's respecting individual claimants would not entirely positive of the interest of class members not parties to the litigation or would otherwise substantially impair or impede the ability of the class members to protect their interest;

(i) The class action is a superior procedural vehicle for this litigation because the primary objective of the class actions, the economies of time, efforts and expense would be achieved;

(j) The vehicle of the class action may be more easily managed than some other procedural vehicle considering the opportunity to afford reasonable notice of sufficient phrases of the litigation, including discovery, including, but not limited to discovery, to class members.

Original Paragraph 49.

Unchanged

Each of the main plaintiffs, individual damages are not substantially different from the damages from other members other representative class. Petitioners will fully and adequately protect the interest of the other members of their representative class, who are too numerous to be named individually and to individually appear in these proceedings.

Original Paragraph 50.

Unchanged

There is a well defined community of interest in questions of law in the fact affecting the parties to be represented; the claims or defenses or defenses of the representative parties are typical of the claims or defenses applicable to the entire class; the question of law in fact

Appendix N

applicable to the entire class predominate over questions which may affect individual members' rights to recover for causes of action as set forth herein.

Original Paragraph 51.

Unchanged

The plaintiffs are asserting claims that are typical of the claims of the entire class of plaintiffs of the entire class of plaintiffs will fairly and adequately represent and protect the interest of the class in that they have no interest antagonistic to those in the class.

Original Paragraph 52.

Unchanged

The plaintiffs have retained counsel who are competent in the prosecution of this type of litigation.

Original Paragraph 53.

Unchanged

The plaintiffs or members of the class who have suffered irreparable harm and damages as a result of the defendant unlawful and wrongful and intentional acts. Absent in class action, defendants will likely retain millions of dollars in profits as a result of their wrong doing to the detriment of the injured victims.

Appendix N

Original Paragraph 54.

Unchanged

Because of the size of the individual class members' claim, few, if any, class members could afford to seek legal action for the wrong complained of herein. Absent in class action, the class members will continue to suffer losses and allow these willful wanton, intentional and unlawful violations to proceed without remedy and allow defendants to retain the proceeds of their ill gotten gain.

WHEREFORE, plaintiffs pray on their behalf individually, and on behalf of all others similarly situated that the defendants be cited to appear and answer this petition and that after due proceedings have, that there be a judgment entered herein as follows;

1. That an Order be entered herein certifying this action and maintaining this action as a class action;

2. That the plaintiffs and class members herein be awarded compensatory damages in an amount to be proven at trial for each named plaintiff and for each member of the plaintiffs class;

3. For such reasonable attorneys fees as may be authorized by the law of the State of Louisiana; for all costs of this litigation together with legal interest thereon from the date of the lost to each plaintiff a..d/or class member, or alternatively, from the date of judicial demand;

Appendix N

4. That the plaintiffs and class members herein be awarded exemplary damages in an amount to be proven at trial for each of the named plaintiffs and for each member of the plaintiffs class.

5. For all other Legal and Equitable relief,

Respectfully Submitted,

LAW OFFICE OF HANY A. ZOHDY
12090 South Harrells Ferry Road
Suite J
Baton Rouge, Louisiana 70816
Tel: (504) 293-5300

By: s/ Hany A. Zohdy
HANY A. ZOHDY,
LA Bar Roll No. 21409

Appendix N

AMENDMENT TO
PLAINTIFFS' ORIGINAL
CLASS ACTION PETITION

ORDER

THE COURT CONSIDERING PLAINTIFF'S MOTION FOR LEAVE TO AMEND ORIGINAL PETITION,

ORDERED, that plaintiff's motion is hereby GRANTED, and that the foregoing amendment to the original petition is entered into the record of these proceedings.

Thus ordered and signed this 8th day of 1998 in the parish of Iberville, state of Louisiana.

s/ Jack T. Marionneaux
JUDGE,
The 18th Judicial District Court

Supreme Court, U.S.
FILED
MAY 3 2002
OFFICE OF THE CLERK

No. 01-757

IN THE

Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC., ROBERT BABB, EDEE TEMPLET, and KENNETH A. DEVUN,

Petitioners,

v.

HURLEY HENSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONERS

ALAN B. NADEL
Litigation Counsel
SYNGENTA CROP PROTECTION, INC.
P.O. Box 18300
Greensboro, NC 27419
(336) 632-6492

HENRY B. ALSOBROOK, JR.
Counsel of Record
MARK C. SURPRENANT
ROBERT N. MARKLE
VALERIA M. SERCOVICH
ADAMS AND REESE LLP
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Attorneys for Petitioners

173705

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

26 pp

QUESTION PRESENTED

Does the All Writs Act, 28 U.S.C. § 1651(a), empower federal district courts to remove state court lawsuits to federal court when the state suit threatens the integrity of the federal court's rulings in ongoing complex litigation?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Syngenta Crop Protection, Inc., was formerly known as Novartis Crop Protection, Inc., which, in turn, was formerly known as Ciba-Geigy Corporation. Its parent corporation is Syngenta Seeds, Inc., and no publicly-held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
Summary of the Argument	6
Argument	7
I. Federal Courts Must Have The Means To Protect Their Judgments	8
II. The District Court Had Ancillary Enforcement Jurisdiction, And The All Writs Act Served As A Tool To Protect The Integrity Of That Court's Judgment	14
Conclusion	18

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 8

Clinton v. Goldsmith, 526 U.S. 529 (1999) 9

Dugas v. Am. Sur. Co., 300 U.S. 414 (1937) 15

In re Agent Orange Prod. Liab. Litig., 996 F.2d 1425 (CA2 1993), *cert. denied sub nom., Ivy v. Diamond Shamrock Chems. Co.*, 510 U.S. 1140 (1994), *Hartman v. Diamond Shamrock Chems. Co.*, 510 U.S. 1140 (1994) 11

In re VMS Sec. Litig., 103 F.3d 1317 (CA7 1996) ... 11

Kikkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) 14, 15, 16

Krippendorf v. Hyde, 110 U.S. 276 (1884) 15

Local Loan Co. v. Hunt, 292 U.S. 234 (1934) 15

McClung v. Silliman, 6 Wheat. 598 (1821) 9

McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994) 13

McIntire v. Wood, 7 Cranch 504 (1813) 9

Page

Minnesota Co. v. St. Paul Co., 2 Wall. 609 (1865) ... 15

Nat'l Ass'n for the Advancement of Colored People v. Metro. Council, 125 F.3d 1171 (CA8 1997), *vacated and remanded for reconsideration*, 522 U.S. 1145 (1998), *reinstated upon reconsideration*, 144 F.3d 1168 (CA8), *cert. denied*, 525 U.S. 826 (1998) 11-12

Peacock v. Thomas, 516 U.S. 349 (1996) 15

Pennsylvania Bureau of Corr. v. United States Marshals Serv., 474 U.S. 34 (1985) 8, 9, 10, 13

Price v. Ciba-Geigy Corp., No. 94-0647-CB-S (S.D. Ala. Jan. 30, 1995) 2, 3, 4, 10, 12, 16, 17

Price v. Johnston, 334 U.S. 266 (1948) 8

Riggs v. Johnson County, 6 Wall. 166 (1868) 15

Rosenbaum v. Bauer, 120 U.S. 450 (1887) 9

Sable v. Gen. Motors Corp., 90 F.3d 171 (CA6 1996) 10, 11

United States v. City of New York, 972 F.2d 464 (CA2 1992) 10

United States v. New York Tel. Co., 434 U.S. 159 (1977) 8, 9, 13

Page

Worcester v. Georgia, 6 Pet. 515 (1832) 7

Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (CA2 1988), *cert. denied*, 489 U.S. 1077 (1989) 10

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1404(a) 2, 4

28 U.S.C. § 1441(a) 1, 5

28 U.S.C. § 1651(a) ..... i, 1, 4, 6, 8

28 U.S.C. § 2101(c) 1

Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 8

Rule:

Sup. Ct. Rule 13.1 1

Page

Other Authorities:

LOTH, CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE AMERICAN REPUBLIC 365 (1948) 7

16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3932 (2d ed. 1996) 9

19 J. MOORE & G. PRATT, MOORE'S FEDERAL PRACTICE § 204.02[4] (3d ed. 1998) 9

OPINIONS BELOW

The opinion of the court of appeals is reported at 261 F.3d 1065. The opinion of the district court is unreported.

STATEMENT OF JURISDICTION

The Court of Appeals for the Eleventh Circuit entered its judgment on August 14, 2001. No one filed a petition for rehearing in that court. Petitioners, invoking this Court's jurisdiction under 28 U.S.C. § 1254(1), filed a petition for a writ of certiorari on November 8, 2001 — within 28 U.S.C. § 2101(c)'s ninety-day window. *See also* Sup. Ct. Rule 13.1, 28 U.S.C. App. On February 19, 2002, this Court entered an order granting the petition.

STATUTORY PROVISIONS INVOLVED

The All Writs Act, more specifically 28 U.S.C. § 1651(a), provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Section 1441(a) of the Judicial Code, 28 U.S.C. § 1441(a), provides that:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United States for the district and division embracing the place where such action is pending. . . .

Section 1404(a) of the Judicial Code, 28 U.S.C. § 1404(a), provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

Respondent Hurley Henson sued Petitioners Syngenta Crop Protection, Inc. (known at the time as Ciba-Geigy Corporation), Robert Babb, Edee Templet, and J[illegible]nneth A. Devun in the 18th Judicial District Court for the P[illegible]sh of Iberville, Louisiana. The suit was filed as a class act[illegible]on behalf of all individuals whom Syngenta employed at its [illegible]. Gabriel, Louisiana facility. Henson sought damages for in[illegible]ries he alleged were caused by exposure to various chemicals, including both chlordimeform, an active ingredient in a pesticide Ciba-Geigy manufactured, and atrazine, a Ciba-Geigy - manufactured herbicide.

Another class action against Ciba-Geigy, *Price v. Ciba-Geigy Corp.*, No. 94-0647-CB-S (S.D. Ala. Jan. 30, 1995), a case involving claims that are, to all intents and purposes, identical to those raised in Henson's suit, had been filed in the Circuit Court of Mobile County, Alabama. The *Price* defendants removed that case to the United States District Court for the Southern District of Alabama, which later certified a nationwide class. That court eventually approved a structured, class-wide settlement. J.A. 89a-90a. The court specifically retained jurisdiction over the case and the settlement funds, and it resolved to "use its equitable powers to enforce this [stipulation] and to protect its jurisdiction over this case and all parties and [settlement class members]." J.A. 39a. That is, "[t]he [court] shall have jurisdiction over all phases of this [stipulation]." J.A. 39a.

The Louisiana state court stayed Henson's suit while Henson and others intervened in the *Price* case and, as intervenors, participated in the settlement negotiations. J.A. 57a, 79a. An elemental component of the settlement ultimately reached, and ultimately approved, was a stipulation that required, among other things, that Henson's case (including all claims against C[illegible]ba-Geigy and the individual defendants, Babb, Temple[illegible]and Devun) be dismissed. Specifically, the stipulation required that the "related case," defined as "*Hurley Henson, et al. v. Ciba-Geigy Corporation, et al.*/Docket No. 43,620, 18th Judicial District Court, Parish of Iberville, State of Louisiana," including all claims against Ciba-Geigy and the individual defendants "shall be dismissed, with prejudice, as of the approval date" of the class settlement. J.A. 36a, 38a.

After the Southern District of Alabama approved the *Price* settlement, making the stipulation a part of its judgment, class counsel in *Price*, in an effort to comply with the stipulation, sought dismissal of the *Henson* case in Louisiana. The state court ordered Henson to show cause why the state case should not be dismissed in accordance with the *Price* stipulation. Despite the language of the stipulation he had signed, Henson's Louisiana counsel, who had represented him as intervenor in the *Price* settlement proceeding, advised the Louisiana court that the *Price* settlement required dismissal only of those claims involving exposure to chlordimeform and not of those resulting from exposure to atrazine or to other chemicals. J.A. 28a, 81a-86a.

As previously quoted, the stipulation embraced the entire *Henson* case, comprising "any and all claims (including, without limitation any CLAIMS defined herein). . . ." J.A. 38a. It said nothing about dismissing only

certain of them. Nevertheless, counsel induced the Louisiana court to suggest that Henson amend his state court petition to assert tort claims arising from exposure to atrazine. Readily accepting the court's invitation to amend, Henson did so.

Once that happened, Ciba-Geigy and the three individual defendants removed the case to the United States District Court for the Middle District of Louisiana based on the All Writs Act, 28 U.S.C. § 1651(a). J.A. 58a-64a. The Defendants promptly moved, under 28 U.S.C. § 1404(a), to transfer the case to the Southern District of Alabama. J.A. 65a-73a. Agreeing with the Defendants, the Middle District of Louisiana promptly sent the case eastward for disposition.

Not pleased that Henson had failed to comply with the stipulation's terms, the Southern District of Alabama, at Ciba-Geigy's behest, dismissed the *Henson* case with prejudice shortly after receiving it. J.A. 30a, 31a, 48a. The court concluded that the *Price* stipulation's terms unequivocally required that the *Henson* case be dismissed in its entirety. J.A. 28a. Simultaneously, exercising jurisdiction in the *Price* case, over whose settlement terms it had maintained ongoing supervision, the court, as a result of Henson's counsel's efforts to thwart the settlement, ordered Henson's counsel to pay Ciba-Geigy the legal fees Ciba-Geigy had incurred in enforcing the settlement. J.A. 29a.

Henson appealed both rulings. The Court of Appeals for the Eleventh Circuit affirmed the district court's order imposing sanctions on Henson's counsel, a ruling not currently before this Court for review. J.A. 17a-18a. Concluding, however, that the district court lacked subject matter jurisdiction over the removed case, the Eleventh Circuit vacated the trial court's order of dismissal of the

Henson case. Upon doing so, it remanded the case to the Southern District of Alabama with instructions to remand the case to the Louisiana state court. J.A. 18a-24a.

The Eleventh Circuit concluded that the district court lacked jurisdiction over the *Henson* case. It premised its conclusion on two principles.

First, it concluded that 28 U.S.C. § 1441(a) authorizes removal only of actions over which the district courts have original jurisdiction. This means that actions are not removable unless they originally could have been filed in federal court. The necessary implication of that rule, according to the court, is that removal is proper only if the All Writs Act could have furnished subject-matter jurisdiction over the *Henson* action had the case initially been filed in federal court. J.A. 22a.

Second, the Eleventh Circuit concluded that the Act does not provide an independent basis of federal subject matter jurisdiction, i.e., a plaintiff cannot sue invoking only the court's All Writs Act power. The court rejected the argument that the All Writs Act may serve as jurisdictional "caulk" to plug cracks in federal jurisdiction through which crafty litigants might otherwise evade the effect of a federal order. J.A. 22a-23a. It disagreed with the assertion that the Act authorizes almost any exercise of authority that is convenient for effectuating a federal judgment, including the exercise of removal jurisdiction over a different action whose prosecution is inconsistent with a federal judgment. J.A. 23a. According to the Eleventh Circuit, permitting "too elastic an interpretation" of the Act serves to transform it from a tool for effectuating Congress's intent in conferring jurisdiction on the federal courts to a device for "judicially re-equilibrating" a state-federal balance the court believed to be Congress's alone to strike. J.A. 23a.

Because of the pronounced split among the Circuits on this important jurisdictional issue, Syngenta timely filed a petition for a writ of certiorari seeking review of the Eleventh Circuit's rejection of the All Writs Act as providing a method by which a federal district court may protect its judgments in complex cases. This Court granted that petition, and the matter is now properly before the Court for decision.

SUMMARY OF THE ARGUMENT

While not a jurisdictional blank check, the All Writs Act, 28 U.S.C. § 1651(a), provides federal courts an effective tool with which to effectuate and prevent the frustration of orders they have previously issued in their exercise of jurisdiction otherwise obtained. The court's All Writs Act power is not to be restricted to instances when it is necessary in the sense that the court could not otherwise physically discharge its duties.

The Act does not provide federal courts with an independent grant of jurisdiction. But it does fill the gaps in federal judicial power when, in extraordinary circumstances like the one presented in this case, those gaps threaten to permit litigants to thwart the otherwise proper exercise of federal courts' jurisdiction.

Under the doctrine of ancillary enforcement jurisdiction, which permits a federal court to manage its proceedings, vindicate its authority, and effectuate its decrees, a district court has jurisdiction when the parties' intention to comply with the terms of a settlement agreement has been made part of the order of dismissal. This may be accomplished either by separate provision (such as one "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order.

Here, a nationwide class action settlement purported to resolve certain issues in a federal court. Respondent Henson's failure to dismiss his state court suit constituted a breach of that agreement and was a violation of the order. Ancillary jurisdiction to enforce the agreement therefore exists. The federal district court, under the jurisdiction "otherwise obtained," appropriately employed the All Writs Act as a tool to bring before it a recalcitrant party who, by pursuing a state court suit seeking the same relief he had already obtained in the federal settlement, violated the agreement and threatened to undermine the federal court's judgment.

ARGUMENT

"John Marshall has made his decision; now, let him enforce it." LOTH, CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE AMERICAN REPUBLIC 365 (1948). Widely attributed to President Andrew Jackson in response to the Court's ruling in *Worcester v. Georgia*, 6 Pet. 515 (1832), the sentiment reflects the attitude all too prevalent among those who flout the judgments of the Courts of the United States by initiating or continuing parallel proceedings in state court in derogation of a federal court's ongoing supervision.

By dint of its decision in this case, the Court of Appeals for the Eleventh Circuit has deprived the district court of an important — indeed, vital — tool with which to safeguard its authority. And it has left Ciba-Geigy, which rationally supposed it had reached a successful, national resolution of its claims, once again subject to the whims of a state-court jury. Unhappily for Ciba-Geigy, such a jury's deliberations are unlikely to be informed by the knowledge that Henson intervened in the nationwide class settlement, participated in the negotiations, agreed to its terms, and accepted its fruits. Neither notions of comity nor principles of federalism require such a penalty.

I. Federal Courts Must Have The Means To Protect Their Judgments

Since its 1948 codification, the All Writs Act has provided that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). This Court has construed the Act to authorize a federal court "'to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.'" *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 40 (1985) (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977)). Further, a federal court's All Writs Act power is not restricted to instances in which it is necessary "in the sense that the court could not otherwise physically discharge its . . . duties." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942). The Act has been characterized "a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" *Price v. Johnston*, 334 U.S. 266, 282 (1948) (quoting *Adams*, 317 U.S. at 273).

In similar form, the Act has endured since the dawn of the Republic. In fact, the Judiciary Act of 1789 provides the first look. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82; *see also Pennsylvania Bureau*, 474 U.S. at 40 (noting that the Act was originally codified in § 14). Section 14 provided that the "courts of the United States[] shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." 1 Stat. at 82.

Petitioners recognize that the Act does not, by its specific terms, provide federal courts with an independent grant of jurisdiction. *See Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999); *Rosenbaum v. Bauer*, 120 U.S. 450, 458-59 (1887) (Act cannot be used to confer jurisdiction that a court would not have without it; it is authorized only when ancillary to a jurisdiction already acquired.); *McIntire v. Wood*, 7 Cranch 504, 505-06 (1813); *see also New York Tel. Co.*, 434 U.S. at 188 n.19 (Stevens, J., dissenting in part). Likewise, the Act does not *enlarge* the federal courts' existing statutory jurisdiction. *Clinton*, 526 U.S. at 535 (citing 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3932, p. 470 (2d ed. 1996) (All Writs Act is not an independent grant of jurisdiction); 19 J. MOORE & G. PRATT, MOORE'S FEDERAL PRACTICE § 204.02[4] (3d ed. 1998) (All Writs Act cannot enlarge a court's jurisdiction)).

Importantly, however, this Court has viewed the Act as "filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pennsylvania Bureau*, 474 U.S. at 41 (citing *McIntire*, *supra*, and *McClung v. Silliman*, 6 Wheat. 598 (1821)). Further, the Court has acknowledged that, under the appropriate circumstances, the power conferred by the Act extends to persons who, although not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice. *New York Tel. Co.*, 434 U.S. at 174. It encompasses even those who have not acted affirmatively to hinder justice. *Id.*

Here, no one suggests that Henson was an ill-informed bystander whose innocent act might inadvertently affect the

implementation of a federal court order. Rather, aiming to have a hand in the settlement's terms, he purposefully intervened in the ongoing *Price* settlement discussions. He actively participated in the negotiations, and, as a result, signed the stipulation he thereupon flouted by convincing the Louisiana trial court that the stipulation should not apply to him. This case therefore epitomizes the need for — and an appropriate use of — the Act to foil the threat to the exercise of a federal court's ongoing supervision over a large-scale class action settlement.

In *Pennsylvania Bureau*, the Court left open a question regarding the extent of the availability of the All Writs Act to a district court under "extraordinary circumstances." *See id.*, 474 U.S. at 43. Other courts, however, have proceeded further and have concluded that, while the Act does not operate, and should not be employed, as a jurisdictional blank check, it does, nonetheless, provide a tool in a federal district court's arsenal to protect the integrity of its judgments.

For instance, in *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (CA2 1988), *cert. denied*, 489 U.S. 1077 (1989), the Second Circuit held that district courts have residual jurisdictional authority under the Act to protect federal consent judgments by removing potentially inconsistent state law claims to federal court. *See id.* at 863-65. Later, the Second Circuit held that a district court may remove a state court action when "removal was necessary to protect the integrity of the Consent Decree" and when "the issues raised by the [state court action] cannot be separated from the relief provided by the consent decree." *United States v. City of New York*, 972 F.2d 464, 469 (CA2 1992). So, too, the Sixth Circuit, in *Sable v. Gen. Motors Corp.*, 90 F.3d 171 (CA6 1996), concluded that the district court acted "well within

its discretion" when it denied a plaintiff's motion to remand, "for it had power under the All Writs Act to protect the federal consent agreements from conflicting state orders." *Id.* at 175.

The Second Circuit also concluded that extraordinary circumstances existed, justifying the district court's removal of a state court case under the Act, in *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425 (CA2 1993), *cert. denied sub nom., Ivy v. Diamond Shamrock Chems. Co.*, 510 U.S. 1140 (1994), *Hartman v. Diamond Shamrock Chems. Co.*, 510 U.S. 1140 (1994). There, the district court was not merely determining the preclusive effect of an earlier final judgment on claims or issues expected to be raised in later collateral proceedings. Rather, it was enforcing an explicit, ongoing order against relitigation of matters it had already decided, and it was guarding the integrity of its rulings in complex multi-district litigation over which it had retained jurisdiction. *See id.* at 1431.

The Seventh Circuit, in *In re VMS Sec. Litig.*, 103 F.3d 1317 (CA7 1996), characterized a set of state court claims as an attempted "end run" around earlier federal class action settlement agreements. *Id.* at 1324-25. The court approved the district court's removal of the state claims under the All Writs Act "in the context of complex class action litigation . . . to enforce its ongoing orders against relitigation and to guard the integrity of its prior rulings over which it had expressly retained jurisdiction." *Id.* at 1324.

The Eighth Circuit, too, deemed All Writs Act removal appropriate in *Nat'l Ass'n for the Advancement of Colored People v. Metro. Council*, 125 F.3d 1171 (CA8 1997), *vacated and remanded for reconsideration*, 522 U.S. 1145 (1998),

reinstated upon reconsideration, 144 F.3d 1168, 1169 (CA8), *cert. denied*, 525 U.S. 826 (1998). The district court had previously issued a consent decree under whose terms the court had retained jurisdiction to supervise compliance with the decree's provisions for a fixed number of years. The later-filed state suit sought injunctive relief concerning the very matters the consent decree governed. Thus, the "district court was confronted with a situation where parties subject to the district court's continuing jurisdiction under the [earlier] decree . . . were resorting to a state forum to relitigate settled and released claims." *Id.* at 1173. Under such extraordinary circumstances, the Eighth Circuit held that the district court was empowered to authorize removal under the All Writs Act to protect the integrity of the federal consent decree even though removal also brought into federal court those members of the class who were not involved in the earlier case. *Id.*

Upon certifying a nationwide settlement class, the Southern District of Alabama, in the *Price* case, painstakingly superintended the proceedings that yielded a complex and far-reaching settlement. Incorporated in the terms of that settlement agreement is the mandate that Henson's Louisiana suit be dismissed in its entirety. Rather than abide by the agreement in which he participated, and from which he benefited, though, Henson misled the Louisiana trial court in his effort to proceed with the state court class action.

What's worse, he succeeded. The district court imposed sanctions on Henson's counsel for his efforts to undermine the settlement — an action the Eleventh Circuit approved. J.A. 17a-18a. In the same judicial breath, however, the Eleventh Circuit left Henson free to proceed in Louisiana state court, in violation of the settlement stipulation; left

Petitioners subject to additional damages awards, despite good faith efforts to negotiate and comply with the settlement agreement; and left the district court unable to act decisively to put things right.

Congress has provided, in the All Writs Act, precisely the jurisdictional caulk necessary to seal "the interstices in federal judicial power" this Court envisioned in *Pennsylvania Bureau*. Should this Court agree with the Eleventh Circuit that the Southern District of Alabama is without the power to take the action it took under the extraordinary circumstances presented here, Henson's actions will operate to frustrate the district court's previous judgment — a judgment rendered in the court's exercise of jurisdiction "otherwise obtained." *See New York Tel. Co.*, 434 U.S. at 172.

This Court has acknowledged that "public policy wisely encourages settlements. . . ." *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994). Failing to permit the district courts to use an essential tool to enforce and protect class action settlements they have approved will do nothing but seriously undermine that public policy. Indeed, it will operate as an incentive for defendants to pursue cases to judgment that they would otherwise be willing to compromise. Similarly, it will operate as an incentive for plaintiffs to settle in one forum secure in the knowledge that they will have an un-penalized second bite in another.

Petitioners strongly urge this Court to view the All Writs Act as a common-sense method by which district courts may prevent the squandering of both judicial and societal resources.

II. The District Court Had Ancillary Enforcement Jurisdiction, And The All Writs Act Served As A Tool To Protect The Integrity Of That Court's Judgment

"The doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise. . . ." *Kikkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994). In the main, though, this Court has embraced the exercise of ancillary jurisdiction for "two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 379-80 (citations omitted).

In *Kikkonen*, the Court determined that neither purpose was satisfied. There, the parties reached a settlement after closing arguments but before the court instructed the jury. They executed a stipulation and order of dismissal, which the trial court signed. The order did not reserve jurisdiction in the district court to enforce the settlement agreement nor did it even refer to the settlement agreement. *Id.* at 377.

The Court concluded that the sole order was that the suit be dismissed, a disposition that was neither flouted nor imperiled by any alleged breach of the settlement agreement. *Id.* at 380. Had the parties' intention to comply with the terms of the settlement agreement been made part of the order of dismissal — either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order — the "situation would [have] be[en] quite different." *Id.* at 381. Under those circumstances, a breach of the

agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. But a court's mere awareness and approval of the terms of the settlement agreement, without more, would not suffice to make them part of its order. *Id.*

Two years later, in *Peacock v. Thomas*, 516 U.S. 349 (1996), the Court, referring to a federal court's ancillary jurisdiction, explained that without jurisdiction to enforce a judgment it has entered, "'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" *Id.* at 356 (quoting *Riggs v. Johnson County*, 6 Wall. 166, 187 (1868)); *see also Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) (federal district court can exercise ancillary jurisdiction over second action to secure or preserve judgment or decree rendered by that court in earlier action). In determining the reach of the federal courts' ancillary jurisdiction, the Court has cautioned against the exercise of jurisdiction over proceedings that are "'entirely new and original.'" *Krippendorf v. Hyde*, 110 U.S. 276, 285 (1884) (quoting *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 633 (1865)). Neither should jurisdiction ordinarily be exercised when "the relief [sought is] of a different kind or on a different principle" from that of the earlier decree. *Dugas v. Am. Sur. Co.*, 300 U.S. 414, 428 (1937).

Ancillary enforcement jurisdiction is, "at its core, a creature of necessity." *Peacock*, 516 U.S. at 359 (citing *Kikkonen*, 511 U.S. at 380 and *Riggs*, 6 Wall. at 187). For all the reasons the Court found ancillary jurisdiction not to exist in both *Peacock* and *Kikkonen*, however, it exists here.

First, the stipulation requiring that Henson's state court suit be dismissed in its entirety was an integral part of the settlement agreement, incorporated into the federal court's order approving the nationwide settlement of the class action in *Price*. J.A. 92a. Second, the district court retained jurisdiction and supervision over the settlement agreement. J.A. 88a, 93a. Where a class action settlement purports to resolve a certain issue in a federal court, a suit in a state court may constitute "a breach of the agreement [that] would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." *Kokkonen*, 511 U.S. at 380. Henson's suit in state court constitutes a breach of the agreement that violates the district court's order in *Price*, and the court therefore has ancillary jurisdiction to enforce the *Price* agreement and protect its judgment.

Third, the relief sought is anything but "entirely new and original." Rather, the *Price* case culminated in a nationwide class settlement agreement. An essential part of the settlement agreement is that pending suits seeking damages from exposure to Ciba-Geigy-manufactured chemical products be dismissed with prejudice. Syngenta sought precisely the same relief here, i.e., that this suit be dismissed with prejudice. Fourth, the relief sought is not "of a different kind or on a different principle" from that of the earlier decree. Under the *Price* settlement, the *Henson* case was required to be dismissed in its entirety. J.A. 28a. The relief Petitioners seek is of precisely the same kind and should be granted precisely on the same principle.

Ciba-Geigy bargained for the dismissal of all suits against it based upon damages alleged to have been caused by exposure to certain of Ciba-Geigy's products. In return, it agreed to pay sizeable amounts to a nationwide settlement fund. As part of the bargain, Ciba-Geigy was to be freed from

the burdens of additional suits. An intervenor in the *Price* proceedings, Henson could nowise feign ignorance of what was sought, what was at stake, or what was contained in the agreement ultimately confected.

Syngenta sought nothing more than to have the district court give effect to the terms of the settlement agreement over which it had agreed to exercise ongoing supervision. Of necessity, the Southern District of Alabama had the ancillary enforcement jurisdiction that would enable it to vindicate its authority and effectuate its decrees.

Thus, in the exercise of the jurisdiction otherwise obtained, the district court properly employed the All Writs Act to bring before it a plaintiff gone rogue and to effectuate the terms of the settlement agreement and prevent the frustration of its previous order by dismissing Henson's suit with prejudice. Far from a jurisdictional blank check, the Act served its fundamental purpose, i.e., to protect and effectuate a federal court's judgment in a case in which jurisdiction had been otherwise obtained.

Consequently, the Southern District of Alabama properly exercised jurisdiction and, in accordance with the *Price* settlement agreement, dismissed the *Henson* case with prejudice. The Eleventh Circuit legally erred in concluding otherwise.

CONCLUSION

The judgment of the Court of Appeals for the Eleventh Circuit should be reversed, and the judgment of the trial court dismissing the case with prejudice should be reinstated.

Respectfully submitted,

ALAN B. NADEL
Litigation Counsel
SYNGENTA CROP PROTECTION, INC.
410 Swing Road
Greensboro, NC 27409
(336) 632-6492

HENRY B. ALSOBROOK, JR.
Counsel of Record
MARK C. SURPRENANT
ROBERT N. MARKLE
VALERIA M. SERCOVICH
ADAMS AND REESE LLP
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Attorneys for Petitioners

(5)

No. 01-757

In The
Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC., ROBERT RABB, EDEE TEMPLET, and KENNETH A. DEVUN,

Petitioners,

v.

HURLEY HENSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

HANY A. ZOHDY
Of Counsel
Suite J
12090 South Harrell's Ferry Road
Baton Rouge, Louisiana 70816
(225) 293-5300

Attorneys for Respondent

BEST AVAILABLE COPY

53 pgs

QUESTION PRESENTED FOR REVIEW

Does the All Writs Act, 28 U.S.C. § 1651(a), grant federal district courts the original jurisdiction required under 28 U.S.C. § 1441 to permit removal of cases that would otherwise be ineligible for removal?

LIST OF PARTIES BELOW

In addition to the parties reflected in the caption, also plaintiffs in the proceedings below were Phillip Hano, Joe Bowman, Randall Sevario, Sr., Betty Hano, David Gray, and Randall Sevario, Jr., as well as a specified class of similarly-situated parties. J.A. 97a.

TABLE OF CONTENTS

Page

Question Presented for Review ..... (i)
List of Parties Below ..... (ii)
Opinions Below 1
Statement of Jurisdiction 1
Statutory Provisions Involved 1
Statement 2
Summary of the Argument 8

Argument 11

I. THE ALL WRITS ACT CAN NEVER PROVIDE THE ORIGINAL JURISDICTION REQUIRED FOR REMOVAL UNDER 28 U.S.C. § 1441 11

A. Removal under 28 U.S.C. § 1441(a) is permissible only where the district court would have original jurisdiction in the case 12

B. The All Writs Act (AWA) does not provide an independent basis of original jurisdiction. 14

II. THERE CAN BE NO OTHER BASIS FOR REMOVAL UNDER THE ALL WRITS ACT. 19

A. Recourse to the AWA is inappropriate because Congress has already specified the mechanism for removals. 19

B. In this case, removal under the AWA is unnecessary because of the availability of injunctions or deference to state court determinations of the preclusive effect of federal judgments. 22

III. "ANCILLARY REMOVAL JURISDICTION," PREMISED ON THE AWA OR A PRIOR FEDERAL JUDGMENT, IS IMPERMISSIBLE. 29

A. Ancillary jurisdiction is not properly before this Court. 29

B. The ancillary jurisdiction doctrine does not provide a basis for removal jurisdiction. 31

Conclusion 38

TABLE OF AUTHORITIES

CASES

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 9, 20, 22, 23
Ahearn v. Charter Township of Bloomfield, 100 F.3d 451 (6th Cir. 1996) 6, 33
Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 22
Amalgamated Clothing Workers of Am. v. Richman Bros. Co., 348 U.S. 511 (1955) 27
Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 35
Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281 (1970) 25, 27
Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) 14
Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971) 13
Carlisle v. United States, 517 U.S. 416 (1996) 17, 21
Cary v. Curtis, 44 U.S. (3 How.) 236 (1845) 15
Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 7, 12
Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) ... 10, 24, 25, 27
City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156 (1997) 8, 12
Clinton v. Goldsmith, 526 U.S. 529 (1999) 7, 9, 17, 19, 21
Ex Parte Republic of Peru, 318 U.S. 578 (1943) 22
Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 13
Franchise Tax Bd. of California v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1 (1983) 12
Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877) 21
Great N. Ry. Co. v. Alexander, 246 U.S. 276 (1918) 21
H.C. Cook Co. v. Beecher, 217 U.S. 497 (1910) 31
Harris v. Nelson, 394 U.S. 286 (1969) 20
Heck v. Humphrey, 512 U.S. 477 (1994) 28
Kline v. Burke Constr. Co., 260 U.S. 226 (1922) 15, 36
Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) 10, 14, 30-32, 34
Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984) 28
Lockerty v. Phillips, 319 U.S. 182 (1943) 15
Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) 13

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 16, 36
Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) 12
McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821) 16
McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813) 9, 15
McNutt v. Gen. Motors Acceptance Corp.,
298 U.S. 178 (1936) 14
Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 12
NAACP, Minneapolis Branch v. Metro. Council,
125 F.3d 1171 (8th Cir. 1997) 26
Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., Inc.,
337 U.S. 582 (1949) 36
Oklahoma Tax Comm'n v. Graham, 489 U.S. 838 (1989) 8, 13
Owen Equip. & Erection Co. v. Kroger,
437 U.S. 365 (1978) 12, 15, 34
Palmore v. United States, 411 U.S. 389 (1973) 15
Parsons Steel, Inc. v. First Alabama Bank,
474 U.S. 518 (1986) 10, 25, 27
Peacock v. Thomas, 516 U.S. 349 (1996) 7, 10, 30, 31, 33, 34
Pennsylvania Bureau of Corr. v. United States Marshals Serv.,
474 U.S. 34 (1985) 7, 9, 17, 19-22
Price v. Johnston, 334 U.S. 266 (1948) 20
Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1867) 34
Rivet v. Regions Bank of Louisiana,
522 U.S. 470 (1998) 10, 13, 15, 28, 33
Rosenbaum v. Bauer, 120 U.S. 450 (1887) 17, 18
Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) 29
Shamrock Oil & Gas Corp. v. Sheets,
313 U.S. 100 (1941) 21
Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941) 27
Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8 (1799) 14
United States Alkali Exp. Ass'n, Inc. v. United States,
325 U.S. 196 (1945) 20, 23
United States v. New York Tel. Co., 434 U.S. 159 (1977) . 7, 9, 17, 19-23
Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977) 24
Whitney v. Dick, 202 U.S. 132 (1906) 22
Willy v. Coastal Corp., 503 U.S. 131 (1992) 14
Yee v. City of Escondido, 503 U.S. 519 (1992) 30

CONSTITUTION AND STATUTES

Federal Constitutional Materials:
Art. III 11, 15, 36

Federal Statutes:
Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789)
section 13 16
section 14 15-17
Act of March 3, 1875, § 2, 18 Stat. 470 17
9 U.S.C. § 205 14
12 U.S.C. § 632 ..... 13, 14
22 U.S.C. § 286g 13
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1332 6
28 U.S.C. § 1367 ..... 2, 5, 29, 30, 33
28 U.S.C. § 1404(a) 6
28 U.S.C. § 1441 ..... *passim*
28 U.S.C. § 1446 ..... 6, 14
28 U.S.C. § 1447 14
28 U.S.C. § 1448 14
28 U.S.C. § 1449 14
28 U.S.C. § 1450 14
28 U.S.C. § 1651(a) ..... *passim*
28 U.S.C. § 1651 (1994) (revisers' notes of 1948) 20
28 U.S.C. § 1738 25
28 U.S.C. § 2283 ..... 2, 10, 23, 24
28 U.S.C. § 2283 (revisers' notes) 27

Federal Rules:
FRCP 8(c) 13
S. Ct. R. 14 30
S. Ct. R. 26 5

OTHER MATERIAL

Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401 (1999) . 13, 15, 18, 26, 33, 34
H.R. 2341, 107th Cong. § 5 (2002) 35
Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998) 17
J. Moore & G. Pratt, MOORE'S FEDERAL PRACTICE (3d ed. 1998) 17
Joan Steinman, *The Newest Frontier of Judicial Activism: Removal under the All Writs Act*, 80 B.U. L. REV. 773 (2000) 14, 26, 27, 36
Charles Alan Wright & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: FEDERAL PRACTICE DESKBOOK (2002) 17
Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1996) 17

RESPONDENT'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit, *Henson v. Ciba-Geigy Corp.*, Nos. 99-6021 & 99-6130 (11th Cir. Aug. 14, 2001), is reported at 261 F.3d 1065, and is reprinted at Pet. App. 1a; J.A. 13a. The U.S. District Court's Order of November 24, 1998, is unreported but is reprinted at Pet. App. 15a; J.A. 27a.

STATEMENT OF JURISDICTION

Petitioners have been granted review from the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of August 14, 2001. This Court granted the Petition for Writ of Certiorari on February 19, 2002. The Supreme Court has jurisdiction to review cases from the courts of appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The All Writs Act, currently codified at 28 U.S.C. § 1651(a), provides in pertinent part that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The removal statute, codified in relevant part at 28 U.S.C. § 1441, provides that "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have

original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." Id. § 1441(a). In addition, "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." Id. § 1441(b).

28 U.S.C. § 2283, known as the Anti-Injunction Act, provides that "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Supplemental or ancillary jurisdiction is prescribed by 28 U.S.C. § 1367, which provides in relevant part that "Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Id. § 1367(a).

STATEMENT

1. The Respondent, Hurley Henson, is the lead plaintiff in a class action (hereinafter, the "*Henson* action") arising from exposure to Petitioners' pesticide chemicals, including the chlordimeform-based insecticide, Galecron. The exposures took place at Petitioner Syngenta Crop Protection, Inc.'s (previously Ciba-Geigy Corporation) production facility at St. Gabriel,

Louisiana. Henson filed the original class action petition, asserting exclusively state-law tort claims, in September 1993 in the 18th Judicial District Court in Iberville Parish, Louisiana. Subsequently, Henson and other Louisiana residents employed at the St. Gabriel facility sought intervention and became members of a class action lawsuit, styled *Price v. Ciba-Geigy* (the "*Price* action"), originally filed in the state circuit court of Mobile County, Alabama, and then properly removed to the U.S. District Court for the Southern District of Alabama. The *Henson* action remained in state court; it was never removed nor consolidated with *Price*.

The federal district court in the *Price* action certified a nationwide class action and approved a Stipulation of Settlement, concluded by the parties on August 26, 1994. See J.A. 32a. The Stipulation defined the relevant "claim[s]" governed by the settlement, and indicated that the settlement only extended to damages arising from exposure to Galecron. See id. (¶ I(G)). No other claims were settled. The Stipulation did refer to the *Henson* action as a "related case," J.A. 36a (¶ AI(1)), and in a clause entitled "Dismissal of Related Case," provided that

> CLASS COUNSEL hereby stipulates that the RELATED CASE, including any and all claims (including, without limitation any CLAIMS defined herein) against CIBA GEIGY CORPORATION and individual defendants . . . shall be dismissed, with prejudice, as of the APPROVAL DATE, and that such RELATED CASE shall be stayed until the APPROVAL DATE. . . .

J.A. 38a (¶ II(4)). Class Counsel for the plaintiffs in the *Henson* action subscribed to the Stipulation of Settlement.

On January 30, 1995, the original Stipulation of Settlement was amended. Paragraph 8 of the Amendment made clear that "CLAIMS of spouses, parents, children and other relatives do not include claims by such persons of alleged direct exposure to GALECRON®, unless such person is an EXPOSED PERSON as defined in the STIPULATION." J.A. 53a (¶ 8). The federal district court, on March 31, 1995, accepted the Stipulation of Settlement and indicated that "The Court shall retain jurisdiction to determine attorneys' fees and expenses, and with respect to future performance of, and any claims relating to performance of, the Settlement agreement and judgment." J.A. 93a (¶ 6).

2. Over three years later, on June 5, 1998, a status conference was held before Judge Marionneaux of the Louisiana 18th Judicial District Court of Iberville Parish regarding the *Henson* action. At that meeting, class counsel in the *Price* action moved for dismissal of the *Henson* case, as per the Stipulation. Mr. Hany Zohdy, counsel for the *Henson* plaintiffs, objected to dismissal of the entirety of the action, based on his interpretation of the Stipulation as amended. The Judicial District Court issued a Notice of a Rule to Show Cause and a hearing was held on August 18, 1998, at which Mr. Pendley (class counsel in *Price*) and Mr. Zohdy attended, but, inexplicably, no representative of the defendants did. At the Show Cause Hearing, Pendley and Zohdy represented that the Stipulation of Settlement applied only to Galecron exposures and, in any event, did not extend to family members of those exposed to other chemicals. J.A. 75a, 83a-85a.

The state court dismissed those aspects of the *Henson* action "as to the Chlordimeform or Galecron" and gave Mr. Zohdy thirty days to amend the complaint to reflect that dismissal and to restate the remaining claims. J.A. 86a. On September 8, 1998, Zohdy filed an Amendment to the Original

Class Action Petition. J.A. 94a. In both the First Amended Petition and a Second Amended Petition, lodged and served on October 10, 1998 (but not filed because of the supervening removal and stay[1]), plaintiffs made clear that the causes of action arising from the workers' direct exposure to chlordimeform were dismissed pursuant to the *Price* settlement, and that they were seeking relief only for claims not earlier settled. J.A. 95a (First Amended Petition); Res. Br. App. 43a-47a (Second Amended Petition).

3. a. On October 13, 1998, in response to the First Amended Complaint, the defendants in the *Henson* action removed the case to the U.S. District Court for the Middle District of Louisiana. J.A. 58a. As already noted, the *Henson* complaint (even as amended), did not assert a federal cause of action, and, because of the individual defendants sued, there was no diversity of citizenship among the litigants. The *Henson* defendants nonetheless asserted that the federal district court had original jurisdiction over the action under the All Writs Act, 28 U.S.C. § 1651, J.A. 60a-62a (¶¶ VII-XII) or, alternatively, under the supplemental jurisdiction statute, id. § 1367, "because the claims in this action are so related to the claims in the Price Class Action 'that they form part of the same case or controversy under Article III of the United States Constitution'." J.A. 63a (¶ XIII). Recognizing also that the removal was filed more than a year after the filing of the original action, in

[1] This document, although designated by Counsel for Respondent pursuant to S.Ct. R. 26.2, was nevertheless excluded from the second printing of the Joint Appendix by the Petitioners on the grounds that it was not properly part of the record below. Respondent respectfully disagrees with this conclusion, and observes that the document was included (without objection) in the Excerpts of Record filed in the court of appeals. It is reprinted in the Appendix as it appeared in the first printing of the Joint Appendix. See, infra, Resp. Br. App. 42a-47a.

contravention of 28 U.S.C. § 1446(b), defendants asserted that the relevant date was the filing of the Amended Complaint. J.A. 63a (¶ XIV).

b. The defendants, immediately after removal of the action to federal court, sought and received a transfer to the Southern District of Alabama under 28 U.S.C. § 1404(a). J.A. 65a. That court proceeded in November 1998 to dismiss with prejudice the entirety of the *Henson* action, see Pet. App. 18a; J.A. 31a, and pursuant to its continuing jurisdiction in the *Price* proceeding, to sanction Attorney Zohdy for attempting "to thwart the court's jurisdiction by filing an amended complaint in *Henson* in which they put forward claims which they say do not fall within the ambit of the Stipulation of Settlement." Pet. App. 16a; J.A. 28a.

c. Henson appealed to the U.S. Court of Appeals for the Eleventh Circuit, which (in a per curiam opinion), affirmed the attorney sanctions but vacated the district court's assertion of removal jurisdiction over the *Henson* action and ordered that the matter be remanded to the Louisiana state court. See Pet. App. 12a; J.A. 24a. First, the court of appeals noted that Ciba-Geigy's removal was untimely under 28 U.S.C. § 1446(b) and impermissible under id. §§ 1332 and 1441(a) because of the presence of diversity-defeating defendants. Pet. App. 4a & n.2; J.A. 16a & n.2 Next, the Eleventh Circuit ruled

> "there is no other possible ground of federal subject-matter jurisdiction. Ciba-Geigy's removal notice also alleged supplemental jurisdiction, by virtue of [the] *Price* [litigation], under 28 U.S.C. § 1367. But § 1367 cannot provide the 'original jurisdiction' that § 1441 demands for an action to be removable. *Ahearn v. Charter Township*, 100 F.3d 451, 456 (6th Cir. 1996). Ciba-Geigy did not, furthermore, assert ancillary jurisdiction, if such jurisdiction exists independent of § 1367 (*see Peacock v. Thomas*, 516 U.S. 349, 116 S. Ct. 862 (1996)), and we therefore do not address it as a potential basis." Pet. App. 7a & n.3; J.A. 19a & n.3.

The court of appeals thus proceeded to consider the defendants' reliance on the All Writs Act, 28 U.S.C. § 1651(a), as the basis for removal.

The Eleventh Circuit observed that this Court has consistently reiterated that removal under 28 U.S.C. § 1441 is possible only where a case "originally could have been filed in federal court." Pet. App. 10a; J.A. 22a (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). Moreover, the All Writs Act's grant of authority "necessary or appropriate in aid [of federal court] jurisdiction[]," 28 U.S.C. § 1651(a), has never been regarded as an independent basis for federal subject-matter jurisdiction. The All Writs Act thus could not, by itself, supply original jurisdiction where it does not otherwise exist. See *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999); *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 40 (1985). See Pet. App. 10a; J.A. 22a

The court of appeals noted that its conclusion was consistent with the history and purpose of the All Writs Act. No description of the Act as "jurisdictional caulk . . . plug[ging] the cracks in federal jurisdiction," Pet. App. 11a; J.A. 23a (citing *United States v. New York Tel. Co.*, 434 U.S. 159, 172-73 (1977), for this "broad view" of the Act), would sanction what is otherwise an impermissibly wide expansion of federal jurisdiction at the expense of state courts. As the Eleventh Circuit observed, such a "re-equilibrating [of the] federal-state balance" is Congress's to make. Id.

d. Both sides sought review here. Respondent joined in supporting Syngenta's petition for review of the question of removal jurisdiction under the All Writs Act. See Pet. (i). Henson sought a conditional cross petition to review the propriety of the imposition of attorneys' sanctions absent an express finding of bad faith conduct. This Court granted review on the All Writs Act question, see 122 S.Ct. 1062 (2002), but denied certiorari on the sanctions matter. Id. at 1079.

SUMMARY OF THE ARGUMENT

Neither the All Writs Act nor the ancillary jurisdiction doctrine permit removal of a case without the original jurisdiction required by 28 U.S.C. § 1441. This is particularly so where Congress has established the statutory scheme for removal, alternate remedies exist to vindicate prior federal judgments, and any other result would profoundly unsettle the balance of authority between state and federal courts.

1. Petitioners concede that the All Writs Act ("AWA") cannot, on its own, provide the original jurisdiction required for removal under section 1441. See Pet. Br. 6, 9. The original jurisdiction requirement is a statutory one, 28 U.S.C. § 1441(a), consistently recognized by this Court, and has never been relaxed absent a clear declaration by Congress to that effect. See *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997); *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989). No basis for original jurisdiction was presented by the amended class action petition filed by Respondent. J.A. 94a.

Two hundred years of this Court's jurisprudence has held that the All Writs Act, now codified at 28 U.S.C. § 1651(a), cannot provide the original jurisdiction required by the

removal statutes. See *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813); *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999). This is entirely consonant with the statutory language of the AWA which makes clear that federal courts can issue writs only "in aid of their respective jurisdictions. . . ." 28 U.S.C. § 1651(a).

2. Even if the All Writs Act could be construed to sanction removals to federal court without original jurisdiction, the "extraordinary circumstances" that would be required, consistent with the AWA's requirement that a writ only issue where "necessary or appropriate" and "agreeable to the usages and principles of law," id., *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977), are not present where either (1) a federal statutory remedy already exists, or (2) other mechanisms are available to secure relief. Removals based on the All Writs Act can be neither appropriate nor necessary.

Resort to the All Writs Act is "'appropriately confined by Congress'," *New York Tel. Co.*, 434 U.S. at 172-73 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)), and "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985). Since removal is solely conditioned by Act of Congress, in no way could a "common law" removal be considered an appropriate exercise of judicial power under the AWA.

Necessity is also a threshold statutory requirement under the All Writs Act, *Adams*, 317 U.S. at 273, and demands that a party not have available to it other, satisfactory, remedial mechanisms. In this case, Petitioners had no fewer than two alternatives to seeking an unauthorized removal to federal court. First, they could have, consistent with the relitigation exception

to the Anti-Injunction Act, 28 U.S.C. § 2283, sought to enjoin the state proceedings in an action brought in federal court for matters actually decided earlier by the district court. See *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147-48 (1988). An injunction may be properly brought before a state court has ruled on the merits of the res judicata issue, see *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986); and such is less offensive to the prerogatives of state tribunals than actually ousting state court jurisdiction via removal of a case. The second alternative available to Petitioners was simply to allow Louisiana's courts to rule on the preclusive effects of the earlier federal judgment, confident that they would reach the correct result. See id. at 525; *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 478 (1998). In any event, an extra-statutory removal under these circumstances can never be a necessary application of the relief afforded by the All Writs Act.

3. Assuming the question of ancillary jurisdiction is even properly before this Court, that doctrine cannot provide the missing link for federal jurisdiction otherwise absent from this case. While ancillary jurisdiction might be invoked "to enable a court to . . . effectuate its decrees," *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994), such cannot be properly understood to allow the removal of cases that are otherwise ineligible under section 1441 because of a lack of original jurisdiction. Moreover, ancillary enforcement jurisdiction could possibly justify removal only to a federal court that had issued the original judgment in question. That is not the case here, and the required transfer of the removed action to the issuing court, J.A. 65a, voids any conceivable ancillary jurisdiction under *Kokkonen*.

"Ancillary enforcement jurisdiction is, at its core, a creature of necessity." *Peacock v. Thomas*, 516 U.S. 349, 359 (1996). No necessity can be shown here by virtue of the

availability to Petitioners of the two complete alternatives of an anti-suit injunction and deference to state courts' preclusion determinations. Thus none of the predicates for even a notional application of ancillary jurisdiction can be argued to exist here. Indeed, judicial countenance of such a theory could fundamentally alter the balance of power between state and federal courts, without the required approval of Congress, and might raise the specter of an unconstitutional expansion of federal court jurisdiction beyond Article III limits.

ARGUMENT

I. THE ALL WRITS ACT CAN NEVER PROVIDE THE ORIGINAL JURISDICTION REQUIRED FOR REMOVAL UNDER 28 U.S.C. § 1441

This case requires the Court to consider and confirm some first principles of federal jurisdiction. One of those implicated here is that removal is limited to instances where cases could be within the original jurisdiction of federal district courts, and that otherwise removal is a procedure completely constrained by Act of Congress. Petitioners properly conceded in their removal papers, see J.A. 60a-63a, that removal would not have been permitted in this case, but for their assertion of the All Writs Act, 28 U.S.C. § 1651(a) (1994) ("AWA"). To prevail in this submission, Petitioners would have to demonstrate either (1) original jurisdiction is not required as a prerequisite for removal here, or (2) the AWA provides an independent basis of federal jurisdiction. And while Petitioners appear to have conceded that these arguments are really untenable, Respondent is obliged – at least briefly – to review these points.

A. Removal under 28 U.S.C. § 1441(a) is permissible only where the district court would have original jurisdiction in the case.

1. Section 1441(a) allows for removal of certain cases from state court to federal court. Section 1441(a) provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." Id. The propriety of a removal has thus depended on whether the case originally could have been filed in federal court. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant.")); *Franchise Tax Bd. of California v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8 (1983)).

Therefore, for removal to a federal district court to be proper, there must be either diversity of citizenship between the parties or a federal question at issue. See, e.g., *Caterpillar*, 482 U.S. at 393; see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816). Diversity jurisdiction is not available when any plaintiff is a citizen of the same state as any defendant. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978). In this case, there was a lack of complete diversity among the parties. See J.A. 96a.

Likewise, Respondent's class action petitions presented no federal question. J.A. 106a-130a, Resp. Br. App. 42a-47a. A case only asserts a federal cause of action when the plaintiff's well-pleaded complaint raises issues of federal law. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987);

Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908). In the case at bar, the plaintiffs' complaint did not raise an issue of federal law. See also *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 476-78 (1998) (rejecting "artful pleading" doctrine enigmatically advanced in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981)). There is no federal question jurisdiction because, "Congress has not authorized removal based on a defense or an anticipated defense federal in character." *Rivet*, 522 U.S. at 472. And since "[c]laim preclusion (res judicata) . . . is an affirmative defense," id. at 476 (citing FRCP 8(c) and *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350 (1971)), a "prior federal judgment does not transform . . . state-law claims into federal claims but rather extinguishes them altogether." Id. at 476-77. See also Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 420-25 (1999) (suggesting *Rivet* entirely forecloses use of the All Writs Act for removal).

This action could not have been originally filed in federal court because the parties were not completely diverse and Henson never raised an issue of federal law. Therefore, removal of this case – in the normal course of federal procedure – would have been manifestly improper.

2. Lest it be suggested that Petitioners could have relied on some removal mechanism not requiring original jurisdiction in the federal district court, this theory would be unavailing. While Congress may, in its discretion, authorize removal without conferring original jurisdiction on the federal courts, see 12 U.S.C. § 632; 22 U.S.C. § 286g, this must be done specifically and expressly. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989). No such congressional statement was made in the All Writs Act to this effect. Moreover, where Congress has allowed removal unencumbered by the

requirement of original jurisdiction, it has either made a cross-reference to the provisions of 28 U.S.C. §§ 1446-50, or has prescribed particular procedures and modalities. See, e.g., 9 U.S.C. § 205; 12 U.S.C. § 632. Again, the AWA does not indicate any such procedural allowance by Congress. See Joan Steinman, *The Newest Frontier of Judicial Activism: Removal under the All Writs Act*, 80 B.U. L. REV. 773, 820-21 (2000).

In short, no basis for removal jurisdiction relied upon by the Petitioners would have permitted them to remove Henson's First Amended Class Action, J.A. 94a, without a showing of original jurisdiction in the federal district court. Petitioners are thus obliged to show that the All Writs Act confers such, and this they cannot do.

B. The All Writs Act does not provide an independent basis of original jurisdiction.

While this point appears to be conceded by Petitioners, see Pet. Br. 6, 9 ("The [All Writs] Act does not provide federal courts with an independent grant of jurisdiction."), it is important to explain why this is so.

1. As courts of limited jurisdiction, the federal courts possess only that power authorized by the Constitution and statutes. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citing *Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). "It is to be presumed that a case lies outside this limited jurisdiction." Id. at 377 (citing *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799)). The burden of establishing the contrary rests upon the party asserting the federal courts' jurisdiction. Id. (citing *McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 182-83 (1936)).

The power of the federal courts is limited by Acts of Congress. *Kroger*, 437 U.S. at 372 (citing *Palmore v. United States*, 411 U.S. 389, 401 (1973); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845)). Even if jurisdiction over a claim is within the power of the federal courts under Article III of the Constitution, it is not within the jurisdiction of the federal courts unless Congress has statutorily granted jurisdiction. It is up to Congress – not the courts – to prescribe the conditions of removal of matters to federal tribunals, and thus potentially to unsettle the delicate balance of concurrent jurisdictions between federal and state courts. *Rivet*, 522 U.S. at 474.

2. This Court has long recognized that the All Writs Act, 28 U.S.C. § 1651, and its precursor statutes cannot provide an independent basis of federal court jurisdiction. See Hoffman, supra, 148 U. PA. L. REV. at 433-39. This is clear from the text of the AWA, as well as the consistent jurisprudence of this Court in glossing its terms.

a. The All Writs Act allows federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The phrase "in aid of their respective jurisdictions" would be meaningless if Congress had intended to have the AWA serve as an independent basis of federal jurisdiction. Manifestly, the All Writs Act did not confer original subject matter jurisdiction on federal district courts.

b. This straightforward construction of the All Writs Act has been invariably embraced by this Court for nearly two centuries. In *McIntire v. Wood*, 11 U.S. (7 Cranch) 503 (1813), the Court had its first opportunity to interpret section 14 of the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82

(federal courts may "issue writs of Scire facias, habeas Corpus, and all other writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.") — the predecessor of the current All Writs Act.[2] The Court held that the All Writs Act conferred no independent jurisdiction on the federal courts. Id. at 506. The plaintiff in *McIntire* urged that § 14 of the Judiciary Act allowed a federal circuit court to issue a writ of mandamus to the register of a state land office on the basis of federal law. Because Congress had not granted jurisdiction over the case to the federal court, however, the federal court had no power to issue a writ of mandamus under section 14. The power of the federal court was "confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction." Id. Thus, section 14 conferred no independent basis of jurisdiction.

The Court reaffirmed the holding of *McIntire* and extended its logic in *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821), a case that involved the same parties and issue as *McIntire*. While the Court noted the language of section 14 allowed a court to issue a writ "necessary for the exercise" of its jurisdiction, the Court also noted the case before it involved an instance of "equivocal language, in which the proposition, though true in the abstract, is in its application to the subject glaringly incorrect." Id. at 601. The Court held section 14 could only have been intended to vest a power to issue writs in cases where jurisdiction already exists, "and not where it is to be courted or acquired, by means of the writ proposed to be sued

[2] It was, of course, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the Court found section 13 of the First Judiciary Act, 1 Stat. 73, 81, to be unconstitutional to the extent that it purported to grant the Supreme Court original jurisdiction over mandamus proceedings.

out." Id. at 601-02.

In a case with particular similarities with this one, *Rosenbaum v. Bauer*, 120 U.S. 450 (1887), this Court made clear that an application for mandamus under the All Writs Act in section 14 (then codified as Rev. Stat. § 716) could not provide the basis required to give the federal court jurisdiction, either original or by removal. Id. at 456-57. There, one of the parties attempted to rely on section two of the Act of March 3, 1875, 18 Stat. 470, to boot-strap removal jurisdiction through the AWA. But this Court made clear that a long line of precedent precluded the use of the All Writs Act to provide an original basis of jurisdiction, even when used in combination with the removal of a case from state court. See id.

c. More recently, the Court has held that the modern version (dating from 1948) of § 14 of the Judiciary Act, the All Writs Act, authorizes a federal court to "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction *otherwise obtained*." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977) (emphasis added). And while some lower federal courts have held that federal courts may issue extraordinary writs as though the All Writs Act does, in fact, provide an independent basis of jurisdiction, this Court consistently has held that it does not. See also Charles Alan Wright & Mary Kay Kane, 20 FEDERAL PRACTICE AND PROCEDURE: FEDERAL PRACTICE DESKBOOK § 40, at 308 n.27 (2002) (the practice of using the AWA to justify removal "has been persuasively criticized by commentators."); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1187-91 (1998) (rejecting use of AWA as an independent basis for in personam jurisdiction over nonresident class members).

For example, in *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985), this Court observed that the All Writs Act is confined "to filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." Id. at 41. See also *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (AWA is a "residual source of authority" not generally available to provide alternatives to other, adequate remedies at law). Also in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), the Court held that the express terms of the AWA confine a court's power to issue writs "'in aid of' its existing statutory jurisdiction; [and] the Act does not enlarge that jurisdiction." Id. at 534-35 (quoting *Pennsylvania Bureau*, 474 U.S. at 41; and citing 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3932, at 470 (2d ed. 1996) and 19 J. Moore & G. Pratt, MOORE'S FEDERAL PRACTICE § 204.02[4] (3d ed. 1998)); see also Hoffman, supra, 148 U. PA. L. REV. at 433-35.

Amicus curiae of Petitioners attempts to minimize the relevance of these cases, see Brief of Products Liability Advisory Council (PLAC Br.), at 17-18, by either suggesting they do not apply in the removal context or by deflecting the inquiry into ancillary jurisdiction. This move to distinguish a long line of this Court's authorities should be unavailing. These precedents stand for the clear and unremarkable proposition that the AWA has never been intended to "boot-strap" or justify otherwise impermissible invocations of federal court jurisdiction. Indeed, at least one of the cases – *Rosenbaum v. Bauer* – certainly contemplated the situation presented here where a party attempts to use removal as a mechanism for seeking federal court review of a case that otherwise would be ineligible. See 120 U.S. at 456-57. Nor, for reasons fully elaborated below, see infra at 31-37, does mixing the idioms of

the All Writs Act and ancillary removal jurisdiction concoct some sort of judge-made "jurisdictional caulk" that certainly has not been sanctioned by Congress.

II. THERE CAN BE NO OTHER BASIS FOR REMOVAL UNDER THE ALL WRITS ACT.

The All Writs Act, 28 U.S.C. § 1651(a), allows courts to issue orders under "exceptional circumstances," *Pennsylvania Bureau*, 474 U.S. at 43, and "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in jurisdiction otherwise obtained." *New York Tel. Co.*, 434 U.S. at 172 (quoting All Writs Act). This seemingly broad grant of judicial authority has its limits, however. These include, at a minimum, that (1) where a federal statutory mechanism already exists, courts may not fashion their own ad hoc remedies, thus making recourse to the AWA "[in]appropriate" and not "agreeable to the usages and principles of law," and (2) other mechanisms are available to secure relief, thus making recourse to the AWA "[un]necessary." Neither the element of appropriateness or the requirement of necessity is satisfied in this case.

A. Recourse to the AWA is inappropriate because Congress has already specified the mechanism for removals.

The All Writs Act cannot justify a "common law" removal, unconstrained and unacknowledged by Congress. Petitioners appear to concede this. Pet. Br. 9 ("Likewise, the [AWA] does not *enlarge* the federal courts' existing statutory jurisdiction." (original emphasis) (citing *Clinton v. Goldsmith*, 526 U.S. at 535)). In *New York Telephone*, the Court

specifically noted the All Writs Act was available, "'[u]nless [the Act's use is] appropriately confined by Congress'." 434 U.S. at 172-73 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)). Judicial discretion to allow an extra-statutory removal has been so constrained by Congress.

More recently, this Court in *Pennsylvania Bureau* distinguished instances where the All Writs Act was the only method by which a federal court could "achieve the rational ends of law" from cases in which there are other alternative statutory mechanisms available for the court to use. 474 U.S. at 42 n.7 (citing *Harris v. Nelson*, 394 U.S. 286, 299 (1969), quoting *Price v. Johnston*, 334 U.S. 266, 282 (1948); *Adams*, 317 U.S. at 273). Moreover, the Court in *Pennsylvania Bureau* indicated that the former language of the All Writs Act, contained in section 14 of the First Judiciary Act, limiting writs to those "not specifically provided for by Statute," was deemed to be applicable to the modern form of the Act. See 474 U.S. at 41. See also 28 U.S.C. § 1651 (1994) (revisers' note of 1948) (indicating that revision was intended to reflect this Court's decision in *United States Alkali Exp. Ass'n, Inc. v. United States*, 325 U.S. 196, 203 (1945), and not to alter any other element or requirement contained in the earlier versions of the statute). Moreover, in *United States Alkali*, this Court pointedly held that "writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible." 325 U.S. at 203.

This Court in *Pennsylvania Bureau* thus required the use of other available statutory measures instead of resorting to the All Writs Act. "Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." 474 U.S. at 43. "[The All Writs Act]

does not authorize [courts] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." Id. See also *Clinton v. Goldsmith*, 526 U.S. at 537 (AWA "invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law."); *Carlisle*, 517 U.S. at 429 ("'The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute'.") (quoting *Pennsylvania Bureau*, 474 U.S. at 43). Consequently, the Court ruled in *Pennsylvania Bureau* that recourse to the AWA was inappropriate because of the existence of relevant provisions of the habeas corpus statute. See 474 U.S. at 42-43.

It hardly bears reminding that removal is solely a creature of statute. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 280 (1918); *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199 (1877). The assertion by amicus curiae of Petitioners, PLAC Br. 19, that the removal statute somehow fails to occupy the field of congressional action in this sphere, or can be equated to an "ordinary writ" within the meaning of the AWA, id. 22 n.6, overlooks this Court's holdings that removal is a unique statutory mechanism with significant federalism implications for the proper balance of power between federal and state tribunals. It is simply extravagant to suggest that it would be appropriate, within the meaning of the All Writs Act's language, for federal courts to permit removal of a case where the clear application of Congress's statutory scheme of removal would bar such an action. Under no circumstances could the removal of a case be considered an appropriate exercise of judicial power pursuant to the All Writs Act.

B. In this case, removal under the AWA is unnecessary because of the availability of injunctions or deference to state court determinations of the preclusive effect of federal judgments.

Necessity is a threshold element for the application of the All Writs Act. This is entirely consonant with the All Writs Act's statutory terms. As this Court noted in *Adams*, the two preliminary inquiries for invocation of the AWA are whether jurisdiction over the matter already vests in the federal court, and then "could the issuance of the writ be deemed 'necessary for the exercise' of that jurisdiction?" 317 U.S. at 273 (quoting *Whitney v. Dick*, 202 U.S. 132, 136-37 (1906)).

Despite the suggestion of amicus curiae of Petitioners, see PLAC Br. 23, necessity has always been regarded by this Court as a statutory predicate for invocation of the All Writs Act, and does not merely come into play by informing a court's discretion as to which sort of writ is to be selected or what sort of relief is to be granted. See *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) ("[i]n order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other means to attain the relief he desires."); *Ex Parte Republic of Peru*, 318 U.S. 578, 584 (1943) (discussing section 262 of 1911 Judicial Code, a precursor to the AWA, and observing that "common law writs, like equitable remedies . . . are usually denied where other adequate remedy is available.").

Necessity, in the context of the AWA, means that recourse to a particular remedial writ offers the only avenue of legitimate relief sought by a party. Notwithstanding the broad language in *New York Telephone*, see 434 U.S. at 172-75, partly repudiated by this Court in *Pennsylvania Bureau*, see 474 U.S. at 40-43, but still extensively relied upon by Petitioners, this

Court was careful to reaffirm the requirement of practical necessity by noting "that without [an order under the All Writs Act] there is no conceivable way in which the [original order] by the District Court could have been successfully accomplished." 434 U.S. at 175. See also *United States Alkali*, 325 U.S. at 201-04. Although "necessariness" need not connote that a court "could not otherwise physically discharge its appellate duties," *Adams*, 317 U.S. at 273, it does require there be no alternative mechanisms for gaining the relief desired.

In this case, Petitioners had no fewer than two alternatives to seeking an unauthorized removal of Henson's first amended class action petition to federal court. Syngenta could have applied for an injunction in federal court, requiring Henson to dismiss the state action, at least to the extent it was inconsistent with the terms of the earlier federal settlement. Alternatively, Syngenta could have – consistent with this Court's precedents – allowed the Louisiana courts to determine the proper preclusive effect of the prior federal judgment, confident that the state courts would have reached the correct result. The availability of these alternative procedural mechanisms made recourse to removal under the authority of the All Writs Act unnecessary.

1. Instead of removing cases, federal courts can properly issue, pursuant to 28 U.S.C. § 2283, an injunction to have the state court action dismissed. The Anti-Injunction Act, 28 U.S.C. § 2283, prohibits a federal court from enjoining state court proceedings unless one of the three express statutory exceptions is satisfied. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Id. The essential purpose of the Anti-Injunction Act is to "forestall[] 'the inevitable friction between the state and federal

courts that ensues from the injunction of state judicial proceedings by a federal court.'" *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988) (quoting *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-631 (1977)). By articulating three express exceptions to the Anti-Injunction Act, Congress recognized that federal interference with state proceedings may sometimes be unavoidable. Congress has permitted injunctions in certain circumstances, "to ensure the effectiveness and supremacy of federal law." Id.

The relitigation exception to the Anti-Injunction Act would have at least allowed Syngenta to apply for an injunction of the state court proceedings, although whether it would have secured such relief would have turned on the merits of its preclusion arguments. The relitigation exception finds its textual basis in the Anti-Injunction Act's provision that a federal court can enjoin a state court proceeding "to protect or effectuate its judgment." 28 U.S.C. § 2283. Once again, the purpose of this clause has been well-articulated by this Court: "The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by a federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel." *Chick Kam Choo*, 486 U.S. at 147.

a. Respondent is mindful that there are significant prerequisites for the use of the relitigation exception under the Anti-Injunction Act, consonant with the important federalism goals advanced by that legislation. Each of these threshold requirements would have been satisfied by Syngenta, had they applied for an injunction within a reasonable period after Henson's filing of the amended class action petition. Aside from attaining personal jurisdiction over the parties, the first of these requirements is that a federal court must, in the prior proceeding, have actually disputed the issue that was later

sought to be relitigated and the federal trier of fact must have actually resolved it. See *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970). "[A]n essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Chick Kam Choo*, 486 U.S. at 148. "Moreover . . . this prerequisite is strict and narrow." Id. Insofar as Syngenta could have argued in its injunction application that the state proceeding was entirely barred by the earlier federal settlement and judgment, this prerequisite assuredly would have been satisfied.

Use of the relitigation exception to the Anti-Injunction Act is also limited "to those situations in which the state court has not yet ruled on the merits of the res judicata issue." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986). "[U]nder the Full Faith and Credit Act a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give." Id. at 523. The relitigation exception of the Anti-Injunction Act does not limit application of the Full Faith and Credit Act, 28 U.S.C. § 1738. See *Parsons Steel*, 474 U.S. at 523-24. Once the state court has ruled on the res judicata issue, "then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision." Id. at 524. Had Syngenta immediately sought an injunction in federal court to bar the state proceedings, it would have been clear that the state court had not ruled on the res judicata issue, satisfying the *Parsons Steel* timing requirement. The Louisiana state court proceedings had not reached a stage of ruling on the prior preclusive effect of the federal settlement, having only invited the plaintiffs to amend their complaint, without any motion or ruling on dismissal, except for the dismissal of the

settled chlordimeform exposure count. See J.A. 86a.

As the prerequisites of the relitigation exception to the Anti-Injunction Act were satisfied here, an injunction could have been sought from a federal court to Henson to discontinue the state court proceeding (at least to the extent that a federal court would have found that the state court proceedings were barred by the earlier federal settlement). This is not to suggest, of course, that an injunction necessarily would have issued in the equitable discretion of the federal court; that would have depended on the district court's appreciation of the preclusive effect of the earlier federal settlement on the subsequent state proceeding. But, in any event, recourse to the All Writs Act to justify a removal was clearly unnecessary.

b. Use of an injunction in these circumstances is less chafing of the federalism concerns implicated in the autonomy and dignity of state courts than the outright ousting of state court jurisdiction via removal. See Hoffman, supra, 148 U. PA. L. REV. at 447, 463-64; Steinman, supra, 80 B.U. L. REV. at 775-76, 816-18. Although a contrary position has been asserted by the amicus curiae of Petitioners and some other authorities, see *NAACP, Minneapolis Branch v. Metro. Council*, 125 F.3d 1171, 1174 (8th Cir. 1997); PLAC Amicus Br. 23-26, this cannot be seriously countenanced. Removal divests the jurisdiction of a state court, and prevents it from carrying-out its adjudicatory responsibilities in toto. By contrast, an injunction addressed to the parties can be narrowly tailored to achieve whatever preclusive relief is sought. The fact that an injunction typically would be directed towards the litigants, and not the state court itself, is further consistent with the dignity interests enshrined in the Anti-Injunction Act.

Moreover, Congress already has made the determination that injunctions of state court proceedings (consistent with the

Anti-Injunction Act) are to be preferred to removals. When the Anti-Injunction Act was amended in 1948 in reaction to *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), see 28 U.S.C. § 2283 (revisers' note), it was precisely with the purpose of allowing federal courts to protect the res judicata effects of their judgments. See *Atlantic Coast Line R.R.*, 398 U.S. at 286-87; Steinman, supra, 80 B.U. L. REV. at 781-82. Congress could have amended the removal statute to achieve this same result, but it did not, making the choice that injunctions were a superior avenue of relief than removals. This Court should not lightly depart from Congress's determination in that respect.

2. Preferably, state courts should be permitted to resolve for themselves issues of the preclusive effect of previous federal judgments. This Court has made clear that absent the application of the relitigation exception to the Anti-Injunction Act, federal courts should allow state court proceedings on the preclusive effect of federal judgments to run their course, including the ultimate reviewing power of this Court. See *Amalgamated Clothing Workers of Am. v. Richman Bros. Co.*, 348 U.S. 511, 520-21 (1955); *Atlantic Coast Line R.R.*, 398 U.S. at 297 ("Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy."); *Chick Kam Choo*, 486 U.S. at 149-50 ("when a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court").

In *Parsons Steel*, this Court was adamant that "[c]hallenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court." 474 U.S. at 525. In any event, "[s]tate courts are bound to apply federal rules in determining

the preclusive effect of federal-court decisions on issues of federal law." *Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994); see also *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361-63 (1984). Litigants in possession of favorable, prior federal judgments should have confidence in the ability of state courts to rule correctly on the preclusive effects of those earlier rulings, and should not seek to oust state court jurisdiction through such a device as removals under the All Writs Act.

Despite the contrary intimation of amicus curiae of Petitioners, PLAC Amicus Br. 16-17 n.5, any doubts on this score were conclusively resolved by this Court's recent decision in *Rivet*, where, in the context of removal (and not an injunction), the Court indicated that "[t]he defense of claim preclusion, we emphasize, is properly made in the state proceeding, subject to this Court's ultimate review." 522 U.S. at 472.

> "In sum, claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b). Such a defense is properly made in the state proceedings, and the state courts' disposition of it is subject to this Court's ultimate review. . . . We note also that under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, a federal court may enjoin state-court proceedings 'where necessary . . . to protect or effectuate its judgments.' Ibid." Id. at 478 & n.3.

In view of *Rivet*'s clarification that removal is not permissible under *Moitie*'s "claim preclusion exception," then it should be beyond peradventure that the All Writs Act cannot provide a legitimate ground for removal based on the preclusive effect of

a prior federal judgment.

Even if an injunction is unavailable, this Court has strenuously held that deference to state courts in determining the preclusive effect of prior federal court judgments is preferable to removal of the case. Despite Petitioners' and their amici's notable lack of confidence in state courts to determine correctly the preclusive effect of a prior federal judgment or settlement, this Court should not succumb to speculative fears of untoward rejections of federal judgments by state tribunals. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999) ("federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design."). In view of the availability of two remedial mechanisms – an application under the Anti-Injunction Act and deference to state court preclusion determinations – that have been either statutorily endorsed, or judicially declared, to be preferable to removal, it cannot be seriously maintained that removal is a necessary proceeding under the All Writs Act. The proper procedural course for this case is, consistent with the court of appeals' disposition, Pet. App. 12a; J.A. 24a, for it to be remanded to state court for a determination on the preclusive effect of the prior federal settlement on any remaining state-law claims.

III. "ANCILLARY REMOVAL JURISDICTION," PREMISED ON THE AWA OR A PRIOR FEDERAL JUDGMENT, IS IMPERMISSIBLE.

A. Ancillary jurisdiction is not properly before this Court.

In addition to the All Writs Act, supplemental jurisdiction, under section 1367, was asserted by Syngenta as a ground for removal jurisdiction in its removal papers. See J.A.

63a. But, as the court of appeals noted, supplemental jurisdiction obviously cannot provide the original jurisdiction required for removal under section 1441. See Pet. App. 7a n.3; J.A. 19a n.3. As for ancillary jurisdiction, the Eleventh Circuit noted that "Ciba-Geigy did not . . . assert [it]" and questioned whether "such jurisdiction exists independent of § 1367." Id. In any event, the Eleventh Circuit did "not address it as a potential basis" of removal jurisdiction. Id. Indeed, the question of ancillary jurisdiction was not raised by Syngenta in its Petition to this Court. See Pet. (i). In fact, nowhere in their Petition are cited the key cases that Petitioners now rely upon, see Pet. Br. 14-16, for their ancillary removal jurisdiction argument - *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994); and *Peacock v. Thomas*, 516 U.S. 349 (1996).

The suggestion that invoking the All Writs Act is tantamount to raising ancillary jurisdiction, such as to make it "fairly included" within Petitioners' Question Presented, see S.Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 535-38 (1992), is untenable. Indeed, Petitioners appear to recognize this by the fact they have reformulated their Question Presented in their main brief. Compare Pet. Br. (i), with Pet (i). Respondent, like the Court, is regrettably left to speculate whether Syngenta's invocation of ancillary jurisdiction is intended as an analytically distinct submission (and thus runs afoul of Rule 14), or as subsidiary to its arguments based on the All Writs Act. In one sense, however, this dispute may be irrelevant; ancillary jurisdiction cannot provide Syngenta with the missing ingredient needed to justify removal here.

B. The ancillary jurisdiction doctrine does not provide a basis for removal jurisdiction.

1. Although with some understatement this Court has observed that "[t]he doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise," *Kokkonen*, 511 U.S. at 379, the broad contours of this exceptional aspect of federal procedure can be readily discerned, and they clearly counsel against its application to sanction removal of a case to federal court that otherwise would be ineligible. For starters, ancillary jurisdiction can properly be asserted only for:

> "two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; . . . and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." Id. at 379-80 (citations omitted).

The parties seem to agree that the first prong – "factual[] interdependen[ce]" – is inapplicable, as the removed action is a second, subsequent lawsuit. See *Peacock*, 516 U.S. at 355 ("In a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction.")(citing *Kokkonen*, 511 U.S. at 380-81; *H.C. Cook Co. v. Beecher*, 217 U.S. 497, 498-99 (1910)). See also PLAC Amicus Br. 15.

As for the second prong of ancillary enforcement jurisdiction, typically once a federal court dismisses a case pursuant to a settlement, it may not later obtain jurisdiction to enforce the settlement through ancillary jurisdiction. *Kokkonen*,

511 U.S. at 381. Petitioners argue, Pet. Br. 16, that this Court carved out an exception where the district court's order of dismissal (1) expressly retained jurisdiction over the settlement agreement and (2) incorporated the terms of the settlement. See *Kokkonen*, 511 U.S. at 381 ("In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist."). A retention of jurisdiction did occur here. J.A. 93a. Nevertheless, the action filed by Respondent in state court was avowedly not seeking to litigate the terms of the earlier federal settlement. See J.A. 83a-86a, 95a; Resp. Br. App. 43a-46a.

2. a. Under these conditions, *Kokkonen* cannot properly be read to allow the removal of cases that are otherwise not removable under section 1441 because of a lack of original jurisdiction. To begin with, the language in *Kokkonen* relied upon by Petitioners is *dicta* – the Court has not contemplated a situation where these factors were present and did not expressly rule that ancillary jurisdiction sanctions removal. The holding of *Kokkonen* was simply that a district court dismissing a case pursuant to a settlement agreement does not retain ancillary jurisdiction to enforce that agreement (a power which belongs to state courts). See 511 U.S. at 381. Ironically, the Court advised in *Kokkonen*:

> "[i]t is to the holdings of our cases, rather than their dicta, that we must attend, and we find none of them that has, for purposes of asserting otherwise nonexistent federal jurisdiction, relied upon a relationship so tenuous as the breach of an agreement that produced the dismissal of an earlier federal suit." Id. at 379.

Allowing ancillary jurisdiction to operate as a judge-made exception to the Congressionally-imposed requirements

of removal would also lead to the anomalous result that something could be achieved by ancillary jurisdiction that could not otherwise be attained by supplemental jurisdiction under section 1367. Courts have regularly rejected section 1441 removal predicated on 28 U.S.C. § 1367 and a previously pending federal suit. See, e.g., *Ahearn v. Charter Township of Bloomfield*, 100 F.3d 451, 456 (6th Cir. 1996). These decisions indicate that the removal statutes call for an analysis of the state suit alone to determine whether it satisfies the original jurisdiction requirement. See also 28 U.S.C. § 1441(b); Hoffman, supra, 148 U. PA. L. REV. at 404 n.11.

This is also consistent with this Court's later ruling in *Peacock* that:

> "a court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims. In a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction." 516 U.S. at 355 (citations omitted).

Likewise, in *Rivet*, this Court's remand of the Louisiana state case demonstrates that even state court proceedings that appear to threaten directly a prior federal judgment may not be removed in the absence of an independent basis of subject matter jurisdiction. See 522 U.S. at 478. Although the jurisdiction a federal court possesses that is ancillary to its original jurisdiction in a case may be sufficient to support the issuance of an injunction, ancillary jurisdiction can never provide a basis for removal under the All Writs Act of an otherwise unremovable case.

b. Even if the dicta in *Kokkonen* is somehow controlling here, ancillary jurisdiction still does not support removal in this matter. This case does not involve an affirmative use of ancillary jurisdiction by a party bringing an action to enforce a settlement agreement in the court that retained jurisdiction. Instead, the defendants in this case are attempting to use ancillary jurisdiction as the basis for removal to a court that did not issue the order. According to § 1441, a party can remove a case only "to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). Under ancillary jurisdiction, only the court that issued the original order of dismissal, having explicitly retained jurisdiction, can later assume jurisdiction over an action to enforce the settlement. *Kokkonen*, 511 U.S. at 381. The required transfer of the removed action, J.A. 65a, negated any conceivable ancillary jurisdiction under *Kokkonen*.

c. The last, and most significant, reason that the ancillary jurisdiction doctrine cannot apply here is that, like the use of the All Writs Act, it is conditioned upon necessity. The relevance of this prong is conceded by Petitioners. Pet. Br. 15. "Ancillary enforcement jurisdiction is, at its core, a creature of necessity." *Peacock*, 516 U.S. at 359 (citing *Kokkonen*, 511 U.S. at 380; *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187-88 (1867)); see id. at 355 ("The basis of the doctrine of ancillary jurisdiction is the practical need 'to protect legal rights or effectively to resolve an entire, logically entwined lawsuit'." (quoting *Kroger*, 437 U.S. at 377)); see also Hoffman, supra, 148 U. PA. L. REV. at 444-45. It is the presence of necessity that confers the "extraordinary circumstances" required to trigger the exercise of ancillary jurisdiction. *Peacock*, 516 U.S. at 359. The Court in *Peacock*, in denying ancillary jurisdiction, emphasized the presence of other "procedural safeguards" that

were sufficient for use by a party seeking to enforce a federal judgment. Id.

As discussed above in relation to the All Writs Act, supra at 22-29, ancillary removal jurisdiction is unnecessary, as two alternatives exist, including deferral to state courts and a proceeding under the Anti-Injunction Act's relitigation exception. Even if, by its broad terms, ancillary jurisdiction were notionally applicable here, its logical predicate of necessity and the availability of other remedial mechanisms would defeat its use. Simply put, Petitioners had no reason or necessity to seek an unauthorized removal to federal court.

3. The suggestion made by amicus curiae of Petitioners to use ancillary jurisdiction as some wide-ranging and far-reaching mechanism to patrol the enforceability of federal settlements is unprecedented. Not only does this proposal carry with it the likelihood of subverting the finely-wrought balance between state and federal court jurisdiction as established by Congress through the removal and Anti-Injunction statutes, it also will make it more likely (not less) that federal and state tribunals will be brought into conflict. And despite their reliance on *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), the teaching of that case is that this Court is properly cautious of suggestions to rewrite statutes or the federal rules in order to pursue some ostensible goal of facilitating the efficiency of multi-state mass tort litigation. See id. at 620, 628-29. Such decisions and policy judgments are properly left to Congress.[3] In any event, sanctioning an illegitimate use of the

[3] For example, legislation is currently before Congress that would allow a broader range of class actions to be removed to federal court. See H.R. 2341, 107th Cong., § 5 (2002). By no means, though, does this proposed legislation go as far as Petitioners' submissions here concerning

(continued...)

All Writs Act in order to permit "common law" removals of cases that would otherwise have to remain in state court is an untoward and dangerous development that this Court should roundly reject.

Finally, accepting the possibility of using some combination of ancillary jurisdiction and the All Writs Act to allow statutorily unauthorized removals of cases would also raise the specter of an unconstitutional expansion of the federal courts' Article III powers. See Steinman, supra, 80 B.U.L. REV. at 827-28 ("where an exercise of jurisdiction is impermissible under the ordinary removal statutes, and cannot be legitimated by reference to ancillary or supplemental jurisdiction, an assertion of jurisdiction via a removal power teased out of the All Writs Act could pose a significant Article III problem. . . . [Where original jurisdiction does not exist], the assertion of jurisdiction over a case via All Writs removal would not merely stretch that statute; it would violate Article III."). To follow the path suggested by Petitioners and their amici would be to ask the Court to accomplish, via judicial fiat, what it has sternly forbade Congress from doing. See *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co. Inc.*, 337 U.S. 582 (1949); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) ("[Congress] may give, withhold or restrict such jurisdiction [to inferior courts] at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."); *Marbury*, 5 U.S. (1 Cranch) at 174-75.

No recourse to plumbing metaphors of the All Writs Act and ancillary jurisdiction as "jurisdictional caulk . . . plug[ging] the cracks in federal jurisdiction," Pet. App. 11a; J.A. 23a, can

[3](...continued)
the use of the All Writs Act or ancillary jurisdiction.

sanction what would otherwise be an impermissibly wide expansion of federal jurisdiction at the expense of state courts. If our system of judicial federalism means anything, it requires that Congress sets the rules for ousting state court jurisdiction through removals, and that proper deference be paid to the power and authority of state courts correctly to render judgment on the enforceability of prior federal decrees. Any other result would mean that on the flimsiest of grounds, and even with robust remedial alternatives, parties can secure removals of cases that properly belong in state court.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record [4]
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

HANY A. ZOHDY
Of Counsel
Suite J
12090 South Harrell's Ferry Road
Baton Rouge, Louisiana 70816
(225) 293-5300

Attorneys for Respondent

June 2002

[4] Counsel acknowledges the assistance of Anthony M. Balloon, Christopher Bly, Anne M. Herron, Rachel D. King, John M. Nading, and Paula G. Shakelton in the preparation of this Brief.

Appendix

Joint Appendix pages 42a-47a

APPENDIX F — SECOND AMENDMENT TO PLAINTIFFS' ORIGINAL CLASS ACTION PETITION

NO.: 43,620 DIV.: (D)

18TH JUDICIAL DISTRICT COURT

PARISH OF IBERVILLE

STATE OF LOUISIANA

HURLEY HENSON, PHILIP HANO, JOE BOWMAN,
RANDALL SEVARIO, SR., BETTY HANO,
DAVID GRAY, RANDALL SEVARIO, JR.

versus

CIBA-GEIGY CORPORATION, ROBERT BABB,
EDEE TEMPLET, KENNETH A. DeVUN

SECOND AMENDMENT TO PLAINTIFFS' ORIGINAL CLASS ACTION PETITION

NOW INTO COURT, through undersigned counsel, comes lead plaintiffs, Hurley Henson, a person of the full age of majority who respectfully moves the court to grant him leave of court to file the following as a second amendment to the foregoing petition correcting certain errors, deleting certain references, and adding paragraphs number 55 & 56 as follow:

Appendix F

GENERAL

Amended to delete any reference to Atrazine and correcting certain date and to read as follow:

On August 18, 1998 this honorable court ordered that the plaintiff in this matter amend his original petition on basis of the following established facts:

1. that the court found that, Geigy workers' causes of action stems from their on the job exposure to the chemical substance chlordimeform as commercially known as Galecron, and their (Geigy Workers) contracting of Bladder Cancer, or any of the limited medical conditions has been settled as a result of the provision of stipulations included in the settlement of the federal class action entitled Russell Price, et. al v. Ciba Geigy, et. al. (CASE NO. 94-0647-CB-S Southern District of Alabama) (Price).

2. the court further orally ordered that the plaintiffs amend their original petition deleting all references to the settled matters (causes) in, and pursuant to, Price.

Wherefore, plaintiff Hurley Henson, on behalf of himself as well as his family members as well as all putative class members, by counsel, submits the following in amendment to his original petition to read as follow:

Appendix F

Original Paragraph 1.
Unchanged

Made defendants herein are the following:

1. **CIBA-GEIGY CORPORATION,** a foreign corporation authorized to do and doing business in the State of Louisiana who has appointed an agent for service of process in Louisiana to-wit: **THE PRENTICE HALL CORPORATION SYSTEMS, INC,** 203 Carondolet Street, Suite 811, New Orleans, Louisiana 70130;

2. **ROBERT BABB,** a person of the full age of majority who can be served at 3905 Highway 75, St. Gabriel, Louisiana 70776;

3. **EDEE TEMPLET,** a person of the full age of majority who can be served at 8872 Bayside Avenue, Baton Rouge, Louisiana 70806; and

4. **KENNETH A. DEVUN,** a person of the full age of majority who can be served at 3905 Highway 75, St. Gabriel, Louisiana 70776;

Each of whom are justly and truly indebted, jointly, severally, and in solido unto the class of plaintiffs herein in an amount which will reasonably compensate each class member for their personal injury, mental and emotional damage, economic loss, past, present and future medical expenses, punitive damages, and judicial interest from date of judicial demand until paid and for all cost of this litigation, for the following, to wit:

Appendix F

Original Paragraph 2.
Changed and corrected to read as follow

This class action is on behalf of Hurley Henson, Phillip Hano, Joe Bowman, Randall Sevrio, Sr., Betty Hano, David Gray, and Randall Sevario, Jr., and all other individuals who have worked at the Ciba-Geigy, St. Gabriel, Iberville Parish, Louisiana, Chemical Production Facilities, these individuals as well as their "immediate" family members were exposed to toxics, noxius, and carcinogenic chemicals including, but not limited to, Arazine, Atrazin and chlordimeform as well as other chemicals. ***Plaintiff Hurley Henson further submits that workers causes of action (only) for their direct exposure to chlordimeform as well as other chemicals as commercially known as Galecron has been settled to the extent permitted by law and for all medical conditions as defined and included in the Price Settlement.***

* * *

55.
New

This class action litigation is hereby instituted on behalf of Geigy workers, their family members as well as residents in the vicinity of the Geigy plant known as the St. Gabriel facility, who are exposed to the chemical Atrazine, Atrazine and chlordimeform as well as outer chemicals that affected the environment, and the drinking waters. However, petitioners in compliance with this court's order dismissing all workers claims in relation to their direct exposure to Chlordimeform as known as Galecron to the extent of the

Appendix F

Price Settlement, clearly submits that nothing in this amendments to the original petition should be construed as a trial to reopen or re-litigate settled claims.

56.
New

Petitioner herein submits that the inclusion of any claims of exposure to chlordimeform is only limited to those in relation to family members of workers as well as all those exposed in a none occupational setting, with the exclusion of class members included as included in the Price settlement.

WHEREFORE, plaintiffs pray on their behalf individually, and on behalf of all others similarly situated that the defendants be cited to appear and answer this petition and that after due proceedings have, that there be a judgment entered herein as follows;

1. That a Order be entered herein certifying this action and maintaining this action as a class action;

2. That the plaintiffs and class members herein be awarded compensatory damages in an amount to be proven at trial for each named plaintiff and for each member of the plaintiffs class;

3. For such reasonable attorneys fees as may be authorized by the law of the State of Louisiana; for all costs of this litigation together with legal interest thereon from the date of the lost to each plaintiff and/or class member, or alternatively, from the date of judicial demand;

4. That the plaintiffs and class members herein be awarded exemplary damages in an amount to be proven at trial for each of the named plaintiffs and for each member of the plaintiffs class.

5. For all other Legal and Equitable relief,

Respectfully Submitted,
THE LAW OFFICE OF HANY A. ZOHDY
12090 s. Harrell's Ferry Road
Suite (J)
Tel: (225) 293-5300

By: _____
HANY A. ZOHDY, LA Bar Roll 21409

Supreme Court U.S.
FILED
JUL 10 2002
OFFICE OF THE CLERK

No. 01-757

IN THE

Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC., ROBERT BABB, EDEE TEMPLET, and KENNETH A. DEVUN,

Petitioners,

v.

HURLEY HENSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

ALAN B. NADEL
Litigation Counsel
SYNGENTA CROP PROTECTION, INC.
410 Swing Road
Greensboro, NC 27419
(336) 632-6492

HENRY B. ALSOBROOK, JR.
Counsel of Record
MARK C. SURPRENANT
ROBERT N. MARKLE
VALERIA M. SERCOVICH
ADAMS AND REESE LLP
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Attorneys for Petitioners

174896

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

The corporate disclosure statement for Petitioner, Syngenta Crop Protection, Inc., was set forth at page ii of Petitioners' Opening Brief, and there are no amendments to that Statement.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iv
Argument	1
I. The All Writs Act Enables a Federal Court to Protect and Effectuate Judgments it has Rendered, and Over Which It has Retained Jurisdiction, from the Actions of Those Who Act to Thwart Them	1
II. The All Writs Act Achieves the Rational Ends of Law	2
A. Availability of Relief Under Exception to Anti-Injunction Act Does Not Undermine a Federal Court's All Writs Act Authority	3
B. A Mere Preclusion Defense is Not at Issue	7
III. Ancillary Jurisdiction Supports the District Court's Removal of the Suit	8
A. The Issue is Properly Before the Court	8

Contents

	Page
B. The Ancillary Jurisdiction Doctrine Applies	10
Conclusion	14

TABLE OF CITED AUTHORITIES

Page

Cases:

Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281 (1970) 3, 4

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 3, 4

City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156 (1997) 9

Clinton v. Goldsmith, 526 U.S. 529 (1999) 1

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 2

Harris v. Nelson, 394 U.S. 286 (1969) 2

Hartman v. Diamond Shamrock Chems. Co., 510 U.S. 1140 (1994) 6

Int'l Ass'n of Machinists & Aerospace Workers v. Nix, 512 F.2d 125 (CA5 1975) 13

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) 10, 11

Mitchell v. Forsyth, 472 U.S. 511 (1985) 12

Nat'l Ass'n for the Adv. of Colored People v. Metro. Council, 125 F.3d 1171 (CA8 1997) 6

Page

Nat'l Ass'n for the Adv. of Colored People v. Metro. Council, 144 F.3d 1168 (CA8), *cert. denied*, 525 U.S. 826 (1998) 5

Peacock v. Thomas, 516 U.S. 349 (1996) 13

Price v. Johnston, 334 U.S. 266 (1948) 2-3

Riggs v. Johnson County, 6 Wall. 166 (1868) 11

Rivet v. Regions Bank of Louisiana, 522 U.S. 470 (1998) 1

Ryan v. Dow Chem. Co., 781 F. Supp. 902 (E.D.N.Y. 1991), *aff'd sub nom., In re Agent Orange Prods. Liab. Litig.*, 996 F.2d 1425 (CA2 1993), *cert. denied sub nom., Ivy v. Diamond Shamrock Chems. Co.*, 510 U.S. 1140 (1994) 6

Saucier v. Katz, 533 U.S. 194 (2001) 12

Travelers Indem. Co. v. Sarkisian, 794 F.2d 754 (CA2), *cert. denied*, 479 U.S. 885 (1986) 2

United States v. Gillock, 445 U.S. 360 (1980) 2

United States v. New York Tel. Co., 434 U.S. 159 (1977) 2, 3

Cited Authorities

	Page
Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977)	4
Worcester v. Georgia, 6 Pet. 515 (1832)	11
Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (CA2 1988), *cert. denied*, 489 U.S. 1077 (1989)	6
Statutes:	
28 U.S.C. § 1367	8, 9
28 U.S.C. § 1651(a)	8
28 U.S.C. § 2283	3
Rules:	
United States Supreme Court Rule 14.1(a)	9
United States Supreme Court Rule 24.1(a)	9
Other Authority:	
14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3729 (3d ed. 1998)	9

ARGUMENT

I. The All Writs Act Enables a Federal Court to Protect and Effectuate Judgments it has Rendered, and Over Which It has Retained Jurisdiction, from the Actions of Those Who Act to Thwart Them

Petitioners Syngenta Crop Protection, Inc. (previously Ciba-Geigy Corporation), Robert Babb, Edee Templet, and Kenneth A. Devun have expressly acknowledged that the All Writs Act does not, by its specific terms, provide federal courts with an independent grant of jurisdiction. Pet. Br. at 9 (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999)). Respondent Hurley Henson's use of that non-issue as a multi-page pummeling of a judicial straw man, *see* Resp. Br. at 14-19, is therefore quite unnecessary.

With nary a hint of irony, Henson suggests that "removal of this case — in the normal course of federal procedure — would have been manifestly improper."[1] Resp. Br. at 13. He avers that federal question jurisdiction is nonexistent because "'Congress has not authorized removal based on a defense or an anticipated defense federal in character.'" Resp. Br. at 13 (quoting *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 472 (1998)). And thus, because "'[c]laim preclusion (res judicata) . . . is an affirmative defense," a "prior federal judgment does not transform . . . state-law claims into federal claims but rather extinguishes them altogether.'" Resp. Br. at 13 (quoting *Rivet*, 522 U.S. at 476-77) (further citations omitted).

While Respondent's quotations from *Rivet* are accurate, they have no bearing on this case. Unlike the district court in *Rivet*, the court here did not take jurisdiction based on an

1. Henson's own intransigence created this odyssey — extending far beyond the "normal" course of federal procedure.

affirmative defense of *res judicata* or the enigmatic second footnote of *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981).

Rather, the court appropriately used its power under the All Writs Act to take jurisdiction over state-law claims that threatened the integrity of the court's judgment in the national class action settlement. That is, the court exercised removal jurisdiction "to effectuate and prevent the frustration of orders" the court had "previously issued in its exercise of jurisdiction otherwise obtained." *See United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977). The district court's power to do what it did flowed from its ongoing supervisory jurisdiction, expressly retained, *see* J.A. 88a, 93a, in the national class action settlement.

Having purposefully intervened in the national class-action settlement, Henson "was not free to abuse the dual court system. . . ." *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 761 (CA2), *cert. denied*, 479 U.S. 885 (1986). Although principles of comity command careful consideration, where important federal interests are at stake, comity yields. *United States v. Gillock*, 445 U.S. 360, 373 (1980). Protecting its judgments and preventing the frustration of its orders are, doubtless, important federal interests. The All Writs Act enables a federal court to protect those interests — to halt the efforts of those who would thwart the court's judgments and flout its authority.

II. The All Writs Act Achieves the Rational Ends of Law

The All Writs Act "has served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve the rational ends of law.'" *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (quoting *Price v. Johnston*, 334 U.S. 266,

282 (1948)). Indeed, "[t]he Court has consistently applied the Act *flexibly* in conformity with these principles." *New York Tel. Co.*, 434 U.S. at 173 (emphasis added).

Under appropriate circumstances, the power conferred by the Act encompasses even those persons who have taken *no* affirmative act to hinder justice. *Id.* at 174. Here, the Eleventh Circuit concluded that Henson *did* act affirmatively to interfere with the implementation of the class settlement — egregiously enough that the court deemed appropriate the sanctions the district court had imposed. J.A. 18a.

A. Availability of Relief Under Exception to Anti-Injunction Act Does Not Undermine a Federal Court's All Writs Act Authority

Henson suggests that removal of the case is not available because Petitioners could have sought to enjoin the Louisiana court's proceedings under the relitigation exception of the Anti-Injunction Act, 28 U.S.C. § 2283. Providing that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments," that Act generally prohibits federal courts from interfering with proceedings in state courts. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 145 (1988).

The Act is not simply a codification of the principle of comity — to be applied or disregarded as the court sees fit — but, rather, is a clear-cut prohibition qualified only by specifically defined exceptions. *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970). As this Court has explained, preventing frequent federal court intervention is vital to make the dual court system work effectively. *Chick Kam Choo*, 486 U.S. at 146. By generally

barring such intervention, "the Act forestalls 'the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court.'" *Id.* (quoting *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977) (plurality opinion)).

Exceptions to the Act's broad injunctive bar are few. A federal court may enjoin state proceedings when: 1) expressly authorized by statute; 2) necessary in aid of the court's jurisdiction; 3) necessary to protect or effectuate the court's judgment. "These exceptions are designed to ensure the effectiveness and supremacy of federal law. But as the Court has recognized, the exceptions are narrow and are 'not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo*, 486 U.S. at 146 (quoting *Atl. Coast Line R.R. Co.*, 398 U.S. at 287).

The third exception, i.e., the "relitigation exception," is the one Henson believes applicable to this case. Congress designed this exception to enable a federal court to prevent state litigation of an issue that previously was presented to — and decided by — the federal court. The exception is based on "the well-recognized concepts of *res judicata* and collateral estoppel." *Id.* at 147.

This case, however, is distinct from the typical claim-preclusion or issue-preclusion matter. It is not, for example, a routine two-party contract-breach suit, litigated to judgment in a federal court, that was followed by a state-court contract-breach suit filed by the dissatisfied federal litigant. Rather, it involves a party who sued defendants who were already defendants in a nationwide class action, seeking damages for identical exposure claims. Not only was Henson not unacquainted with the previous suit, he traveled two states away and intervened in it, assuring that he would have control over, and would benefit from, its outcome.

He participated in that suit, and his objections were taken into account when the final settlement agreement was confected; in short, his continued participation in the nationwide class action was both substantial and meaningful. He signed the settlement stipulation knowing full well that he was obliged to dismiss the state-court suit, or, at the very least, to cooperate in seeking its dismissal.

He also knew that the district court was to: "retain jurisdiction over this case," "use its equitable powers to enforce this [stipulation]," and "protect its jurisdiction over this case and all parties." J.A. 39a. He was aware that the court would "have jurisdiction over all phases of" the settlement stipulation. J.A. 39a. Indeed, embodied in the judgment are the words "[t]he court shall retain jurisdiction with respect to future performance of, and any claims related to performance of, the [s]ettlement agreement and judgment." J.A. 88a.

This is precisely the type of extraordinary circumstance that justifies a removal so that a federal court that retains — and never relinquishes — jurisdiction in a case may protect its judgment and put an immediate end to a recalcitrant litigant's flouting of that judgment. Contrary to Henson's assertion, the district court is not prohibited from removing the case simply because Petitioners *could* have sought relief, and *might* have succeeded in obtaining relief, under the relitigation exception to the Anti-Injunction Act. Rather, as the Court of Appeals for the Eighth Circuit recognized in *Nat'l Ass'n for the Adv. of Colored People v. Metro. Council*, 144 F.3d 1168 (CA8), *cert. denied*, 525 U.S. 826 (1998), relief by way of injunction under the relitigation exception is "another procedural option," but its availability does not preclude the district court's use of the All Writs Act to protect its judgment. *Id.* at 1172.

Henson contends that the use of an injunction in the circumstances of this case "is less chafing of the federalism concerns implicated in the autonomy and dignity of state courts than the outright ousting of state court jurisdiction via removal." Resp. Br. at 26. Not so.

Were removal to be held improper under the All Writs Act, however, the Louisiana court would be faced with a situation in which any order it issued would be subject to the injunctive powers of the federal court under the relitigation exception. Thus, the use of the All Writs Act in this case to effectuate removal is "a less drastic, and therefore preferable, result." *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 864 (CA2 1988), *cert. denied*, 489 U.S. 1077 (1989); *see also Nat'l Ass'n for the Adv. of Colored People v. Metro. Council*, 125 F.3d 1171, 1174 (CA8 1997) (given the choices, removal better preserves state-federal relations than would a resort to injunction); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 902, 918 (E.D.N.Y. 1991) (removal of actions to federal court, under the circumstances, is preferred because it affords greater comity to state courts and is less burdensome than injunction), *aff'd sub nom., In re Agent Orange Prods. Liab. Litig.*, 996 F.2d 1425 (CA2 1993), *cert. denied sub nom., Ivy v. Diamond Shamrock Chems. Co.*, 510 U.S. 1140 (1994), *Hartman v. Diamond Shamrock Chems. Co.*, 510 U.S. 1140 (1994).

Thus, the use of the All Writs Act to effect the removal and dismissal of the case that Henson was obliged, under the settlement agreement, to dismiss is not prohibited merely by virtue of the fact that Petitioners had available another option.

B. A Mere Preclusion Defense is Not at Issue

One certainly cannot argue with Henson's statement that "[p]referably, state courts should be permitted to resolve for themselves issues of the preclusive effect of previous federal judgments." Resp. Br. at 27. Were this case simply about the ability of a state court to analyze and resolve a defensive plea of claim-preclusion or issue-preclusion based upon an antecedent federal court judgment, Henson's assertion that "federal courts should allow state court proceedings on the preclusive effect of federal judgments to run their course, including the ultimate reviewing power of this Court," Resp. Br. at 27, would be reasonable enough. But that is not what this case entails.

Henson signed a settlement stipulation that required that the "related case," i.e., this one, be dismissed upon approval of the nationwide class settlement. Accordingly, he was not free to proceed with the state case, in direct violation of the settlement stipulation. Had he not signed the settlement stipulation, Henson might have been free to proceed, compelling Petitioners to make a defensive preclusion plea. But by virtue of the federal court's judgment, which incorporated the settlement agreement, Henson relinquished the option to proceed with his state court case at all.[2] Petitioners agreed to the settlement, among other reasons, to be free from the significant costs and further burdens of such endeavors. And the federal court, having approved the

2. That did not stop him from trying, though. He filed a first amended petition, J.A. 94a-137a. He even attempted to file a second amended petition, which he has included as Appendix F to his Respondent's Brief. Petitioners withheld this document from the Joint Appendix because it did not appear in either the state court record or the federal court record. That it was incorrectly included in the Record Excerpts Henson filed in the Eleventh Circuit, *see* Resp. Br. at 5 n.1, does not alter the fact that it simply never existed as a part of the record.

settlement and having specifically retained ongoing supervisory jurisdiction, was entitled to have its judgments respected — not openly and actively flouted — by the settlement's signatories.

This case does not involve the question of a state court's competence to entertain a *res judicata* plea and, presumably, to reach the right result. Neither does it involve a question of proper deference to the state court. Rather, it is an extraordinary example of one who, after participating in the formulation of the settlement agreement, unabashedly ignores its fundamental requirements.

Those who, like Petitioners, have acted in good faith to reach a national resolution of a dispute are entitled to rely on the settlement agreement, as embodied in the federal court's judgment. Under just such extraordinary circumstances, the federal court must have at its disposal the means to put to a quick end the further efforts of those who, like Henson, refuse to abide by the federal court's judgment.

The All Writs Act is the very means by which the court is permitted to act to ensure its judgments are complied with and to protect those like Petitioners who have willingly complied.

III. Ancillary Jurisdiction Supports the District Court's Removal of the Suit

A. The Issue is Properly Before the Court

Respondent asserts that the ancillary jurisdiction doctrine is not properly before the Court. Resp. Br. at 29-30. He is mistaken. As Henson acknowledges, Petitioners invoked jurisdiction under 28 U.S.C. §§ 1651(a) and 1367 when

removing the case from state court. Resp. Br. at 29. In their brief to the Court of Appeals for the Eleventh Circuit, Petitioners again invoked those statutes.

Referring specifically to 28 U.S.C. § 1367, this Court has explained that Congress combined the doctrines of pendent and *ancillary jurisdiction* under a common heading. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997). That the Eleventh Circuit opted not to address the issue does not mean Petitioners did not raise it earlier, and it certainly does not bar them from raising it now.

Respondent has also expressed puzzlement about Petitioners' formulation of the question presented — slightly different in their brief from its phrasing in their cert. petition. But the slight alteration rests on no sinister underpinnings. This Court's Rule 24.1(a) provides that "[t]he phrasing of the questions presented [in the brief] need not be identical with that in the petition for a writ of certiorari . . . but the brief may not raise additional questions or change the substance of the questions already presented. . . ." Petitioners have raised no additional questions nor have they changed the substance of the question already presented.

Indeed, in compliance with Rule 14.1(a), Petitioners' question is not argumentative, is not repetitive, and is short. Moreover, the ancillary jurisdiction doctrine is inextricably bound up with a federal court's use of the All Writs Act to remove a suit from state court so that it may protect and effectuate a judgment in a matter in which it has specifically retained ongoing jurisdiction. *See* 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3729, at 236-37 (3d ed. 1998) (federal court's exercise of All Writs Act authority to remove otherwise non-removable state court case to effectuate and prevent frustration of orders previously issued in exercise of

jurisdiction otherwise obtained is in nature of ancillary removal jurisdiction). It is thus fairly included within the question presented.

B. The Ancillary Jurisdiction Doctrine Applies

It is a fair assumption that if one or more of this Court's precedents *compelled* a result in this case, the case would not now be awaiting the Court's review. Petitioners are therefore at a loss to determine why Respondent has taken such pains to focus the Court's attention on the strict holding in *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994), as though Petitioners had argued that *Kokkonen* dictates the outcome here. *See* Resp. Br. 32. They did not and do not.

Kokkonen involved a claimed breach of a settlement agreement, which this Court determined did not flout or imperil the district court's earlier judgment of dismissal. *Id.* at 380. The Court, however, carefully noted that the

> *situation would be quite different* if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal — either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order.

Id. at 381 (emphasis added). As if anticipating the circumstances of this case, the Court explained that "a breach of [such an] agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." *Id.* In *Kokkonen*, the trial court's "mere awareness and approval of the terms of the settlement

agreement" did not suffice to make them part of the order. *Id.* Under *Kokkonen*'s facts, this Court's holding was hardly surprising.

The situation here, however, is "quite different." The trial court expressly "retain[ed] jurisdiction with respect to future performance of, and any claims related to the performance of, the Settlement agreement and judgment." J.A. 88a, 93a. As contemplated in *Kokkonen*, Respondent's breach of the agreement in this case violated the district court's order, and ancillary jurisdiction to protect and effectuate the district court's judgment therefore exists.

Respondent may not be as brazen in his disregard of the district court's judgment as was President Jackson in his dismissive statement about *Worcester v. Georgia*, 6 Pet. 515 (1832). *See* Pet. Br. at 7. But neither did President Jackson intervene in *Worcester* and shape a settlement agreement — one whose terms he promptly disregarded.

Federal courts are, undeniably, courts of limited jurisdiction. That status, however, has never obliged them to sit feebly by — pitiful, helpless giants — while litigants decide unilaterally whether it pleases them to be bound by the courts' judgments. Were a federal court without jurisdiction to enforce a judgment it has entered, the judicial power would be but a sham — incomplete and entirely inadequate to the purposes for which it was bestowed in the Constitution. *See Riggs v. Johnson County*, 6 Wall. 166, 187 (1868).

Respondent's concern about the creation of unwarranted federal and state court conflicts, *see* Resp. Br. at 35, is — at least in the abstract — both understandable and admirable. But it is imperative to recall that Respondent himself has provoked whatever clash may exist. No one dragooned him

into the Southern District of Alabama. He did not opt out of the nationwide settlement class. Quite the contrary; he freely intervened. Having participated in the settlement's confection, influenced its terms, and obtained its benefits, Respondent triumphantly returned to Louisiana. Apparently not yet sated, he sought to sweeten the bargain he struck with Petitioners in federal court — intentionally disobeying one of the bargain's fundamental terms — by proceeding in state court with the very case he had pledged to dismiss.

One of Respondent's proposed alternatives to enabling the federal court to put a stop to the efforts to thwart its judgment is "deferral to [the] state court[] . . . ," presumably relying on the state court to bar the suit. Resp. Br. at 35. Petitioners, however, by entering into a nationwide settlement, intended to arrange their financial affairs — to buy stability. Whatever benefit Petitioners, or others who find themselves in a similar position, may have bargained for will be irretrievably lost should they be compelled to litigate, in state court, that which they have already settled in federal court. The burdens on both judicial systems are exponentially increased.

While not perfectly analogous, this Court's rulings on qualified immunity are instructive when contemplating what litigants like Petitioners stand to lose should the federal courts be deemed to lack jurisdiction to enforce settlement agreements over which they have expressly retained jurisdiction. The Court has explained that "[q]ualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). This immunity is "'an *immunity from suit* rather than a mere defense to liability . . . .'" *Id.* And it is "'effectively lost if a case is erroneously permitted to go to trial.'" *Id.* at 201 (quoting *Mitchell*, 472 U.S. at 526).

One who, like Petitioners, settles a nationwide class action in federal court and bargains with one like Respondent, who intervened and, in the settlement agreement, agreed to dismiss a closely-related state suit in its entirety, will effectively lose the benefit of his bargain if he must litigate a *res judicata* bar in state court. "[A] federal court need not stand idly by and hope that the state court perceives that the issues before it formed the basis of prior federal court litigation." *Int'l Ass'n of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125, 132 (CA5 1975). A binding settlement agreement, when the district court has retained jurisdiction to preside over its implementation, should stand as an entitlement not to face the burdens of further litigation.

Ancillary enforcement jurisdiction is, indeed, "a creature of necessity." *Peacock v. Thomas*, 516 U.S. 349, 359 (1996). To protect and effectuate their judgments in complex litigation in which they have retained jurisdiction, federal courts urgently need just such a creature.

CONCLUSION

The judgment of the Court of Appeals for the Eleventh Circuit should be reversed, and the judgment of the trial court dismissing the case with prejudice should be reinstated.

Respectfully submitted,

ALAN B. NADEL
Litigation Counsel
SYNGENTA CROP PROTECTION, INC.
410 Swing Road
Greensboro, NC 27419
(336) 632-6492

HENRY B. ALSOBROOK, JR.
Counsel of Record
MARK C. SURPRENANT
ROBERT N. MARKLE
VALERIA M. SERCOVICH
ADAMS AND REESE LLP
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Attorneys for Petitioners

Supreme Court, U.S.
FILED
MAY 6 2002
OFFICE OF THE CLERK

No. 01-757

IN THE

Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC.,
ROBERT BABB, EDEE TEMPLET,
and KENNETH A. DEVUN,

Petitioners,

v.

HURLEY HENSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONERS

HUGH YOUNG
JONATHAN HARRISON
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
Suite 510
1850 Centennial Park Drive
Reston, Virginia 22091

ROBERT N. WEINER
Counsel of Record
DANIEL S. PARISER
JONATHAN P. HOOKS
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Attorneys for Amicus Curiae

173841

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

45 pp

TABLE OF CONTENTS

	Page
Table Of Cited Authorities	iii
Interest Of Amicus Curiae	1
Summary Of Argument	1
Background	3
A. The Torrent of Individual Cases	4
B. The Spread of Duplicative Class Actions	6
C. Class Settlements and Widespread Efforts to Evade Them	8
Argument	13
I. The All Writs Act Confers Removal Authority Based On Continuing Jurisdiction To Enforce A Prior Federal Court Judgment.	13
II. Removal Is An Appropriate Exercise Of Authority Under The All Writs Act To Effectuate The District Court's Prior Judgment.	18
A. The All Writs Act Supplements Section 1441	18

Contents

Page

B. Removal Intrudes Less on the Prerogatives of the State Court than an Injunction and Should Be an Available Remedy 23

Conclusion 29

Appendix — Corporate Members Of Product Liability Advisory Council, Inc. 1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 28

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 3, 4, 8, 11, 12, 25

Bd. of County Comm'rs of Labette Co., Kan. v. United States ex rel. Moulton, 112 U.S. 217 (1884) 17

Bylinski v. City of Allen Park, 169 F.3d 1001 (6th Cir. 1999) 10

Carlough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir. 1993) 10

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 24

Clinton v. Goldsmith, 526 U.S. 529 (1999) 17, 18

Dornberger v. Metro. Life Ins. Co., 203 F.R.D. 118 (S.D.N.Y. 2001) 10

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 20

FTC v. Dean Foods Co., 384 U.S. 597 (1966) 20, 21

Georgine v. Amchem Prods., Inc., No. Civ. A. 93-0215, 1995 WL 561297 (E.D. Pa. Sept. 18, 1995) 10, 11, 26

Page

Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998) 10

Helvering v. Hallock, 309 U.S. 106 (1940) 21

Henson v. Ciba-Geigy Corp., 261 F.3d 1065 (11th Cir. 2001) 13, 14, 16, 19, 23

Hillman v. Webley, 115 F.3d 1461 (10th Cir. 1997) .. 10

Hills & Co. v. Hoover, 220 U.S. 329 (1911) 22

Holland v. New Jersey Dept. of Corr., Civ. A. Nos. 93-1683, 94-2391, 94-3087, 1994 WL 507801 (D.N.J. Sept. 14, 1994) 10

In re Agent Orange Prod. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993) 9

In re Am. Honda Motor Co., Dealerships Relations Litig., 162 F. Supp. 2d 387 (D. Md. 2001) 10

In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985) 10, 24

In re BankAmerica Corp. Sec. Litig., 95 F. Supp. 2d 1044 (E.D. Mo. 2000), *aff'd*, 263 F.3d 795 (8th Cir. 2001) 10

In re Cendant Corp. Litig., 264 F.3d 201 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 1300 (2002) 8

In re Claasen, 140 U.S. 200 (1891) 22

Page

In re Corrugated Container Antitrust Litig., 659 F.2d 1332 (5th Cir. 1981) 24

In re Diet Drugs, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) 4, 5, 6, 9, 10, 11, 12, 26

In re First Commodity Corp. of Boston, Customer Accounts Litig., 89 B.R. 283 (D. Mass. 1988) 10

In re Joint E. & S. Dists. Asbestos Litig., 120 B.R. 648 (E.D.N.Y. and S.D.N.Y. 1990) 10

In re Joint E. & S. Dists. Asbestos Litig., 134 F.R.D. 32 (E.D.N.Y. and S.D.N.Y. 1990) 10

In re Lease Oil Antitrust Litig. (No. II), 48 F. Supp. 2d 699 (S.D. Tex. 1998) 10

In re Painewebber Ltd. P'ships Litig., No. 94 Civ. 8547 SHS, 1996 WL 374162 (S.D.N.Y. July 1, 1996) 10

In re Prudential Ins. Co. of Am. Sales Practice Litig., 261 F.3d 355 (3d Cir. 2001) 11, 24, 26, 27, 28

In re Prudential Ins. Co. of Am. Sales Practices Litig., No. MDL 1061, Civ. A. 95-4704, 1999 WL 496491 (D.N.J. May 6, 1999) 10

In re School Asbestos Litig., No. 83-0268, 1991 WL 61156 (E.D. Pa. Apr. 16, 1991), *aff'd*, 950 F.2d 723 (3d Cir. 1991) 10

Page

In re Synthroid Mktg. Litig., 197 F.R.D. 607 (N.D. Ill. 2000) 10

In re Texas, 110 F. Supp. 2d 514 (E.D. Tex. 2000) ... 10

In re VMS Secs. Litig., 103 F.3d 1317 (7th Cir. 1996) 9, 24

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) 2, 15

La Buy v. Howes Leather Co., 352 U.S. 249 (1957) 20

Marshall v. Am. Gen. Life & Accident Ins. Co., 174 F. Supp. 2d 709 (M.D. Tenn. 2001) 10

McClellan v. Carland, 217 U.S. 268 (1910) 21

McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813) .. 17

Montgomery v. Aetna Plywood, Inc., 231 F.3d 399 (7th Cir. 2000), *cert. denied*, 522 U.S. 1038 (2001) 10, 14

Mycka v. Celotex Corp., No. Civ. A. 87-2633, 1988 WL 80042 (D.D.C. July 18, 1988) 10

NAACP v. Metro. Council, 144 F.3d 1168 (8th Cir. 1998) 10

Pauley v. Bethenergy Mines, Inc., 501 U.S. 680 (1991) 19

Page

Peacock v. Thomas, 516 U.S. 349 (1996) 2, 15, 16

Pennsylvania Bureau of Corr. v. United States Marshals Serv., 474 U.S. 34 (1985) 2, 18, 22, 23

Rivet v. Regions Bank of Louisiana, 522 U.S. 470 (1998) 16, 17

Scardelletti v. Debarr, 265 F.3d 195 (4th Cir. 2001), *cert. granted*, 122 S. Ct. 663 (2001) 10

Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001) 10

Texas v. Real Parties in Interest, 259 F.3d 387 (5th Cir. 2001) 19

United States v. Morgan, 346 U.S. 502 (1954) 21

United States v. New York Tel. Co., 434 U.S. 159 (1977) 13, 17, 18, 22, 23

Wayman v. Southard, 23 U.S. 1 (1825) 15, 22

White v. Nat'l Football League, 41 F.3d 402 (8th Cir. 1994), *abrogated on other grounds, Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) 10

Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988) 14, 25

Younger v. Harris, 401 U.S. 37 (1971) 25

Page

Statutes:

28 U.S.C. § 1291 20

28 U.S.C. § 1292 20

28 U.S.C. § 1331 17

28 U.S.C. § 1404(a) 27

28 U.S.C. § 1407 ..... 6, 27

28 U.S.C. § 1441 19

28 U.S.C. § 1441(a) 19

28 U.S.C. § 1447(b) 22

28 U.S.C. § 1651 ..... 12, 22

28 U.S.C. § 1651(a) 1, 13, 23

28 U.S.C. § 2241 21

28 U.S.C. § 2255 21

28 U.S.C. § 2283 ..... 23, 25

26 Stat. at L.826, chap. 517 21

Rule:

Fed. R. Civ. P. 8(f) 14

Page

Other Authorities:

Alejandro Bodipo-Memba, *Judge OKs Class Action in Tire Case; Ford, Firestone Plan to Appeal*, Detroit Free Press, Nov. 29, 2001 5

Class Action Fairness Act of 2001: Hearing on H.R. 2341 Before the House Committee on the Judiciary, 107th Cong., 2d Sess. (2002) 6

John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (2000) 11

John H. Beisner & Jessica Davison Miller, *They're Making a Federal Case Out of It . . . in State Court*, 25 Harv. J.L. & Pub. Pol'y 143 (2002) .. 7

Firestone Settles 40 Percent of Suits, AP Online, July 23, 2001, *available at* 2001 WL 25486106 ..... 5, 7

Lisa Girion et al., *Pfizer Agrees to Settle Suit Over Diabetes Drug Rezulin*, L.A. Times, Dec. 22, 2001 ..... 5, 7

Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. Pa. L. Rev. 401 (1999) 19

H.R. Rep. No. 107-370 (2002) 6, 7, 8

Page

Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73 (1789) 25

Manual for Complex Litigation (Third) § 41.44 (1995) 9

Mass Torts and Class Action Lawsuits: Hearing before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 105th Cong., 2d Sess. 96 (1998) 5, 6

Francis E. McGovern, *Class Actions and Social Issue Torts in the Gulf South*, 74 Tulane L. Rev 1655 (2000) 12

Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 Harv. L. Rev. 747 (2002) 12, 26

Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800 (1983) 19

Press Release, Stanford Law School Securities Class Action Clearinghouse, *Federal Securities Class Action Cases Filed and Defendant Market Cap Losses Surge in 2001* (Mar. 15, 2002), *available at* http:/securities.stanford.edu/scac_press/20020315_CR_SCAC.pdf 7

Page

Stanford Law School Securities Class Action Clearinghouse, *Post-Reform Act Securities Case Settlements: Securities Fraud "Mega-Settlements" List, available at* http://securities.stanford.edu/Settlements/largest__post__reform__act.html 8, 9

Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. Rev. 773 (2000) 19

Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071 (1990) 19

Thomas E. Willging et al., *Individual Characteristics of Mass Torts Case Congregations: A Report to the Mass Torts Working Group* (Federal Judicial Center 1999) 5, 8

5 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc. § 1286 (3d ed 1998) (hereinafter "Wright & Miller") 14

13 Wright & Miller § 3521 25

14C Wright & Miller § 3729 14

16 Wright & Miller § 3934.1 20

INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 122 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed over 525 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.[1]

SUMMARY OF ARGUMENT

The Court of Appeals' formulation of the issue here — whether the All Writs Act provides an "independent" basis for federal jurisdiction — is imprecise. The Act authorizes issuance of writs "in aid of" a federal court's retained jurisdiction over a prior judgment. 28 U.S.C. § 1651(a). Federal courts have ancillary jurisdiction to enforce and

---

1. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the parties have consented to the filing of this brief. Copies of those consents have been filed with the Clerk of the Court.

protect such prior judgments. Within that authority, the All Writs Act provides the statutory or procedural mechanism by which the courts act.

This Court has approved the exercise of ancillary enforcement jurisdiction "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379-80 (1994). To that end, it has "approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings . . . to assist in the protection and enforcement of federal judgments." *Peacock v. Thomas*, 516 U.S. 349, 356 (1996).

The All Writs Act authorizes removal of a case that falls within the ancillary enforcement jurisdiction of the federal courts. The Court of Appeals suggested that, in enacting other more specific removal provisions, Congress intended to exclude removal from the writs authorized by the All Writs Act. That argument contrives an intent Congress did not express. Nothing in the removal statutes or their legislative history suggests any inclination to limit the remedies available under the All Writs Act. Indeed, Congress seems to have enacted the All Writs Act precisely to provide the federal courts with the flexibility and authority necessary to protect their jurisdiction through procedural mechanisms such as removal. After all, this Court has repeatedly construed the All Writs Act to fill "the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 41 (1985).

Nor is the existence of a similar remedy under the All Writs Act, injunctive relief, a reason to preclude use of the Act to remove a case under appropriate circumstances.

In suggesting that the availability of injunctive relief under the Act rendered removal unnecessary, the Court of Appeals confused the threshold for invoking the All Writs Act with the standard for determining what type of relief under the Act is proper. A federal court should have discretion to choose the remedy most appropriate to the particular case before it. If anything, removal — as a well-accepted and even routine practice — in many circumstances does less to undermine the prerogatives of state courts and more to foster comity than enjoining a pending state proceeding.

Indeed, this may be increasingly so after the decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Parties seeking to comply with that decision are fashioning settlements that permit class members to opt out in the future as to certain claims and under specified conditions. Federal courts called upon to enforce the settlements, if limited to injunctive relief, will have to impinge significantly on state court proceedings, dismissing some claims, modifying others, barring certain arguments, and even regulating discovery. Removal avoids those potential intrusions. The federal courts should not be denied this valuable procedural tool under the All Writs Act.

BACKGROUND

This case exemplifies a significant practical problem confronting the federal courts: how a federal court can protect and effectuate a class action settlement over which it has retained jurisdiction in the face of efforts by litigants to evade that settlement.

Recent years have witnessed a deluge of mass tort claims, as well as financial and consumer fraud litigation, including not only individual actions, but also proliferating and duplicative class actions. Class actions in general may offer

potential efficiencies, but they also harbor significant difficulties. They not only magnify the risks for defendants, but also replicate those dangers again and again in copycat actions filed around the nation. Defendants overwhelmed by this assault have often sought to achieve some respite — to buy peace — by negotiating global class action settlements in federal court, at least within the limits allowed by this Court in *Amchem*. But just as water inevitably seeks an outlet, the impulse to litigate seeks a loophole, spawning efforts to evade the lawful orders of federal district courts which bar further litigation of settled claims. This case and many like it involve nothing more than efforts to enforce those orders, and implicate nothing less than the continued integrity of the judicial function.

A. *The Torrent of Individual Cases*

In *Amchem*, this Court recognized the magnitude of the problem presented by asbestos – hundreds of thousands of lawsuits, long delays, repetitive litigation of the same issues, immense transaction costs, and ultimately the threat of exhaustion of the defendants' assets. *See id.* at 598; *id.* at 632 (Breyer, J., concurring in part and dissenting in part). But that was just for one product. A multitude of individual cases involving other products also have clogged the courts — including well over 18,000 claims involving diet drugs; more than 3000 cases involving computer keyboards; 4500 individual lawsuits involving the diabetes drug Rezulin; more than 500 personal injury cases involving automobile tires; over 4000 cases involving the contraceptive Norplant; more than 4000 cases involving bone screws used for spinal support after surgery; and over 27,000 cases in federal court plus thousands more in state court (1800 in California alone) involving breast implants.[2]

2. *See In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, MDL No. 1203, Civ. No. 99-

(Cont'd)

Judge Anthony Scirica of the U.S. Court of Appeals for the Third Circuit, chair of the Judicial Conference Committee on Rules of Practice and Procedure, noted these disquieting forces in testimony before Congress:

> The literature is full of articles documenting the steady upward trend in mass tort filings. Toxic torts, imperfect drugs, defective products, faulty medical devices, and other products of modern technology all have been held accountable for causing harm to large numbers of people. Consumer fraud, in the nature of deceptive practices, is also part of the mass torts landscape. It is apparent that the future will generate still more mass torts litigation.

Mass Torts and Class Action Lawsuits: Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong., 2d Sess. 19 (1998) (statement of Anthony Scirica, U.S. Circuit Judge, U.S. Court of Appeals for the Third Circuit).

Many thousands of these individual cases, not brought as class actions, have proceeded in state courts, as plaintiffs have joined non-diverse defendants — often improperly — to avoid federal jurisdiction. Because it is impossible in state

(Cont'd)

20593, 2000 WL 1222042, at *3 (E.D. Pa. Aug. 28, 2000) (diet drugs); Thomas E. Willging et al., *Individual Characteristics of Mass Torts Case Congregations: A Report to the Mass Torts Working Group* (Federal Judicial Center 1999), at 21-23 (keyboards), 42-45 (Norplant), 45-47 (bone screws), 53-55 (breast implants); Alejandro Bodipo-Memba, *Judge OKs Class Action in Tire Case; Ford, Firestone Plan to Appeal*, Detroit Free Press, Nov. 29, 2001, at 1D (tires); *Firestone Settles 40 Percent of Suits*, AP Online, July 23, 2001, *available at* 2001 WL 25486106 (same); Lisa Girion et al., *Pfizer Agrees to Settle Suit Over Diabetes Drug Rezulin*, L.A. Times, Dec. 22, 2001, at A1 (Rezulin).

court to consolidate all claims nationwide, as the multi-district litigation statute allows in federal court, 28 U.S.C. § 1407, defendants must litigate those individual cases "banana by banana," or at least "bunch by bunch," in each state. The burdens on the parties, as well as the courts, are potentially ruinous.

B. *The Spread of Duplicative Class Actions*

Compounding the difficulties posed by the proliferation of individual lawsuits across the country has been the surge of class action filings. A recent study by the RAND Institute for Civil Justice documented a doubling or tripling of putative class actions, concentrated in state courts. *See* H.R. Rep. No. 107-370, at 12 (2002) (citing *Class Action Fairness Act of 2001: Hearing on H.R. 2341 Before the House Committee on the Judiciary*, 107th Cong., 2d Sess. (2002) (statement of John Beisner)). Another survey showed that class actions filed in federal court had increased 340 percent over the past decade, while those filed in state court had increased 1315 percent. *See* H.R. Rep. No. 107-370, at 12. The General Counsel of Ford Motor Company recently attested to over 100 class action lawsuits pending as of 1997, up from 50 in 1995, against that company *alone*. *See Mass Torts and Class Action Lawsuits: Hearing before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong., 2d Sess. 96-97 (1998) (statement of John W. Martin, Jr., Vice President and General Counsel, Ford Motor Co.). Similarly, over 100 class actions were instituted against American Home Products Corporation following withdrawal of its diet medications Pondimin and Redux from the market in 1997. *See In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, MDL No. 1203, Civ. No. 99-20593, 2000 WL 1222042, at *3 (E.D. Pa. Aug. 28, 2000). There are 105 class actions involving the diabetes drug Rezulin and over 100 involving automobile tires.

See Lisa Girion et al., *Pfizer Agrees to Settle Suit Over Diabetes Drug Rezulin*, L.A. Times, Dec. 22, 2001, at A1; *Firestone Settles 40 Percent of Suits*, AP Online, July 23, 2001, *available at* 2001 WL 25486106. A few state trial courts have become magnets for many of these interstate class actions. Indeed, one county judge certified 35 classes from 1996 to 1998, compared to 35 for 1997 in the entire federal court system. *See* H.R. Rep. No. 107-370, at 18. Even outside of the mass tort arena, the numbers of class action filings have increased dramatically in recent years. *See* Press Release, Stanford Law School Securities Class Action Clearinghouse, *Federal Securities Class Action Cases Filed and Defendant Market Cap Losses Surge in 2001* (Mar. 15, 2002), *available at* http://securities.stanford.edu/scac_press/20020315_CR_SCAC.pdf (announcing that 327 federal class action lawsuits were filed in 2001 — a 60 percent increase from the previous year).

This multiplicity of class actions has strained the judicial system, and burdened litigants. A recent report to the Judicial Conference Advisory Committee on Civil Rules worried that, "[a]s a result of competition among class action attorneys, defendants may find themselves litigating in multiple jurisdictions and venues concurrently, which drives transaction costs upward." Memorandum from Judge Lee Rosenthal, Prof. H. Cooper, Prof. Richard Marcus, to Advisory Comm. on Civil Rules (Apr. 10, 2001) (quoted in John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court*, 25 Harv. J.L. & Pub. Pol'y 143, 145 (2002)). Along the same lines, a Congressional report appraised the casualties that result from this cross-fire:

> In the Federal court system, class actions asserting the same claims on behalf of the same or overlapping classes may be transferred to one district for coordinated or consolidated pretrial

> proceedings. When these class actions are pending in State courts, however, there is no corresponding mechanism for cogently adjudicating the competing suits.

H.R. Rep. No. 107-370, at 10.

C. *Class Settlements and Widespread Efforts to Evade Them*

It may be, as this Court noted in *Amchem*, that a legislative remedy is the best solution to the proliferation of multiple repetitive litigation. Yet absent legislative action, which has been under discussion for many years, federal judges still must adjudicate cases before them using the legitimate tools at their disposal. In practice, a partial solution to the pandemonium of this mass litigation does lie within the authority of the federal courts, and litigants have in fact pursued it. Consistent with the limits set by *Amchem*, they have reached global settlements of federal class actions that resolve many, potentially thousands, of the cases in federal and state court, including the numerous copycat class actions. As of January 1999, there were class settlements affecting all or part of 10 mass tort litigations, and two more awaited judicial approval. *See* Thomas E. Willging et al., *Individual Characteristics of Mass Torts Case Congregations: A Report to the Mass Torts Working Group* (Federal Judicial Center 1999), at 9. In the securities fraud context, there have been 12 class settlements since 1995 that have been valued at more than 100 million dollars each, including a settlement of over 3.2 billion dollars in the *Cendant* litigation. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 217 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 1300 (2002); Stanford Law School Securities Class Action Clearinghouse, *Post-Reform Act Securities Case Settlements: Securities Fraud "Mega-Settlements" List*, *available at* http://securities.stanford.edu/Settlements/

largest__ post__reform__act.html. As part of such settlements, the federal district courts typically retain jurisdiction to enforce their terms, including provisions barring other suits. *See In re Diet Drugs*, 2000 WL 1222042, at *72 (retaining jurisdiction over nationwide diet drug settlement); *see also* Manual for Complex Litigation (Third) § 41.44 (1995) (form of order approving settlement and containing reservation of jurisdiction). Unfortunately, many litigants, unwilling to accept the finality of federal court judgments in the face of opportunities to submerge their claims with thousands of others, have sought to evade the orders of those courts and to pursue the cases that federal courts have resolved.

The prevalence of these efforts is evident from the very line of cases that this Court granted *certiorari* to review. In *In re Agent Orange Product Liability Litigation*, 996 F.2d 1425, 1429 (2d Cir. 1993), for example, the court had previously approved a 180 million dollar settlement of claims involving the use of Agent Orange during the Vietnam War. As part of the prior settlement, the district court barred class members from instituting actions based on exposure to Agent Orange, and retained jurisdiction to administer the settlement. *See id.* Five years later, plaintiffs brought two class action suits in Texas state court asserting claims identical to those extinguished by the prior settlement. *See id.* at 1430. Similarly, in *In re VMS Securities Litigation*, 103 F.3d 1317, 1319-20 (7th Cir. 1996), class members who had not opted out of a class action settlement under the federal securities law subsequently brought a class action in California state court alleging that the defendant had fraudulently induced them to settle. There, too, the district court had enjoined further litigation and had retained jurisdiction to enforce its orders. *See id.* at 1320. In both these cases, courts approved removal under the All Writs Act to deal with the violations of the court orders. In scores of other reported cases, whether

or not they approve invocation of the All Writs Act, courts have confronted similar efforts to evade prior orders entered in settlement of class action litigation.[3]

---

3. *See In re Diet Drugs*, 282 F.3d 220 (3d Cir. 2002); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001); *Scardelletti v. Debarr*, 265 F.3d 195 (4th Cir. 2001), *cert. granted*, 122 S. Ct. 663 (2001); *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399 (7th Cir. 2000), *cert. denied*, 522 U.S. 1038 (2001); *Bylinski v. City of Allen Park*, 169 F.3d 1001 (6th Cir. 1999); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998); *NAACP v. Metro. Council*, 144 F.3d 1168 (8th Cir. 1998); *Hillman v. Webley*, 115 F.3d 1461 (10th Cir. 1997); *White v. Nat'l Football League*, 41 F.3d 402 (8th Cir. 1994), *abrogated on other grounds*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993); *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985); *Marshall v. Am. Gen. Life & Accident Ins. Co.*, 174 F. Supp. 2d 709 (M.D. Tenn. 2001); *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118 (S.D.N.Y. 2001); *In re Am. Honda Motor Co., Dealerships Relations Litig.*, 162 F. Supp. 2d 387 (D. Md. 2001); *In re Texas*, 110 F. Supp. 2d 514 (E.D. Tex. 2000); *In re BankAmerica Corp. Sec. Litig.*, 95 F. Supp. 2d 1044 (E.D. Mo. 2000), *aff'd*, 263 F.3d 795 (8th Cir. 2001); *In re Synthroid Mktg. Litig.*, 197 F.R.D. 607 (N.D. Ill. 2000); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, No. MDL 1061, Civ. A. 95-4704, 1999 WL 496491 (D.N.J. May 6, 1999); *In re Lease Oil Antitrust Litig. (No. II)*, 48 F. Supp. 2d 699 (S.D. Tex. 1998); *In re Painewebber Ltd. P'ships Litig.*, No. 94 Civ. 8547 SHS, 1996 WL 374162 (S.D.N.Y. July 1, 1996); *Georgine v. Amchem Prods., Inc.*, No. Civ. A. 93-0215, 1995 WL 561297 (E.D. Pa. Sept. 18, 1995); *Holland v. New Jersey Dept. of Corr.*, Civ. A. Nos. 93-1683, 94-2391, 94-3087, 1994 WL 507801 (D.N.J. Sept. 14, 1994); *In re School Asbestos Litig.*, No. 83-0268, 1991 WL 61156 (E.D. Pa. Apr. 16, 1991), *aff'd*, 950 F.2d 723 (3d Cir. 1991); *In re Joint E. & S. Dists. Asbestos Litig.*, 134 F.R.D. 32 (E.D.N.Y. and S.D.N.Y. 1990); *In re Joint E. & S. Dists. Asbestos Litig.*, 120 B.R. 648 (E.D.N.Y. and S.D.N.Y. 1990); *Mycka v. Celotex Corp.*, No. Civ. A. 87-2633, 1988 WL 80042 (D.D.C. July 18, 1988); *In re First Commodity Corp. of Boston, Customer Accounts Litig.*, 89 B.R. 283 (D. Mass. 1988).

Such efforts persist. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 363 (3d Cir. 2001). And they are likely to increase further as litigants craft settlements consistent with the dictates of *Amchem*. As noted, the court in that case expressed concern that a class action settlement could bind claimants who might not "even know of their exposure, or realize the extent of the harm they may incur" and who consequently might "not have the information or foresight needed to decide, intelligently, whether to stay in or opt out." *Amchem*, 521 U.S. at 628. To ameliorate this problem, litigants have negotiated, and courts have approved, so called "back-end" opt-out rights in connection with class action settlements, enabling claimants to exit the settlement and to pursue claims in the tort system should their medical condition change over time. *See, e.g., Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630-31 (3d Cir. 1996) (subsequent history omitted) (explaining that "because of the difficulty in forecasting what their futures hold, [class members in the asbestos settlement ultimately overturned in *Amchem*] would probably desire a delayed opt out like the one employed in *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 150 (S.D. Ohio 1992)"); *see also* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 432-33 (2000).

Such back-end opt-out provisions result from arduous negotiations and inevitably reflect a delicate balance between defendants' rights to finality and limited liability, on the one hand, and claimants' interests in flexibility to re-enter the tort system, on the other. For example, in the recent diet drug settlement involving some 6 million class members, which was approved by the United States District Court for the Eastern District of Pennsylvania, the settlement agreement allowed two separate opportunities for claimants to exit the settlement later. *See In re Diet Drugs*, 2000 WL 1222042, at

*25-26 (E.D. Pa. Aug. 28, 2000). In exchange for the defendant's waiver of the statute of limitations and other defenses, both of those opt-out opportunities were limited in certain respects, for example, precluding claims for punitive damages by later opt-out claimants and restricting permissible causes of action to those based on specific medical conditions. *See id.* One commentator has hailed the diet drug settlement's structure in this respect as "a bold new approach" to "reconcile the demands of autonomy and peace in the mass tort class action." Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 Harv. L. Rev. 747, 796 (2002).

Amchem will likely yield more and more such settlements with back-end opt-outs for those whose injuries arise or worsen after the settlement is concluded. *See* Francis E. McGovern, *Class Actions and Social Issue Torts in the Gulf South*, 74 Tulane L. Rev 1655, 1676 (2000). That some class members under these procedures can legitimately bring cases after a global settlement while others cannot virtually assures disputes, as litigants whose claims are barred try to shoehorn themselves within the negotiated exceptions. Increasingly, courts will have to resolve those disputes, or else undercut the very mechanisms that *Amchem* demands.

To do that, federal courts will need the flexibility to employ all the authorized means at their disposal to preserve and protect the peace for which the parties have bargained. The All Writs Act confers on federal courts the statutory authority to enforce their judgments under appropriate circumstances using any means that are "agreeable to the usages and principles of law." 28 U.S.C. § 1651. As discussed below, where litigants flout a settlement over which a federal court has retained jurisdiction, removal is one of the tools in the toolbox which fall within that authority.

ARGUMENT

I. The All Writs Act Confers Removal Authority Based On Continuing Jurisdiction To Enforce A Prior Federal Court Judgment.

The Court of Appeals imprecisely characterized the issue presented in this case, assessing whether the All Writs Act conferred an "*independent basis* of federal subject-matter jurisdiction" to permit removal. *Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1070 (11th Cir. 2001) (emphasis added). By its terms, though, the All Writs Act authorizes federal courts to "issue all writs necessary or appropriate *in aid of their respective jurisdictions*." 28 U.S.C. § 1651(a) (emphasis added). This Court confirmed the source of that authority in *United States v. New York Telephone Company*, 434 U.S. 159, 172 (1977), noting that a federal court has power "to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders previously issued in its exercise of *jurisdiction otherwise obtained*." (emphasis added). In this case, the District Court, in the prior *Price* action, had approved the stipulation of settlement, an express term of which was the dismissal of the *Henson* case. *See Henson*, 261 F.3d at 1067. Moreover, the District Court explicitly retained jurisdiction to enforce that stipulation of settlement. *See* Joint App. 88a, 93a. Thus, the removal is "in aid of," and derives from, the District Court's continuing jurisdiction to enforce the very terms of its judgment in *Price*.

It follows that while the All Writs Act does provide statutory authority for the procedure of removing a case to federal court, the assumption of jurisdiction underlying that removal is ancillary to the jurisdiction the Court previously acquired and retained over the earlier action. As Wright and Miller observe, "[i]n exceptional circumstances a federal

court may use its authority under Section 1651 of Title 28, the All Writs Act, to remove an otherwise non-removable state court case. . . . The exercise of this power may be thought to be in the nature of ancillary removal jurisdiction." 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc. § 3729 (3d ed. 1998) (hereinafter "Wright & Miller") (internal quotations and footnote omitted); *cf. Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 411-12 & n.4 (7th Cir. 2000) (explaining that the All Writs Act is "simply the source of authority for removal" of cases where ancillary enforcement jurisdiction exists).[4]

This Court has recognized that a federal court has ancillary jurisdiction "(1) to permit disposition by a single

4. The Court of Appeals declined to address "ancillary jurisdiction" in this case because, it stated, Petitioner did not assert it. *See Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1068 n.3 (11th Cir. 2001). But the assertion of jurisdiction under the All Writs Act, which by its terms refers to jurisdiction previously obtained, is inherently an invocation of ancillary jurisdiction. This Court should not require the incantation of magic words to re-characterize what reliance on the statute necessarily entails. *See* Fed. R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice."); 5 Wright & Miller § 1286 ("The federal rules do not adhere to the ancient principle that a pleading must be construed most strongly against the pleader. Nor do the federal courts require technical exactness or draw refined inferences against the pleader.") (footnotes omitted).

In any event, the District Court's own authority to enforce its judgments and protect its jurisdiction cannot be circumscribed by the parties' characterization of the source of that authority. The District Court has its own interests in preserving the integrity of its judgments, and has the independent authority to assert jurisdiction in order to do so. *Cf. Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 858 (2d Cir. 1988) (approving the district court's *sua sponte* ordering of defendant to remove a case pursuant to the All Writs Act).

court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-80 (1994) (citations omitted). The first type of ancillary jurisdiction, that based merely on "factual and logical dependence on the primary lawsuit," cannot support a subsequent lawsuit based solely on federal jurisdiction over the prior suit. *See Peacock v. Thomas*, 516 U.S. 349, 355 (1996) (internal quotations omitted). But that is not the case with the second form of ancillary jurisdiction, which has been characterized as "ancillary enforcement jurisdiction." *Id.* at 356. Thus, this Court has "approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings" brought to protect and enforce prior federal judgments. *Id.*; *cf. Wayman v. Southard*, 23 U.S. 1, 23 (1825) (Marshall, J.) ("The jurisdiction of a Court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied."). Asserting ancillary enforcement jurisdiction over this case similarly enables the District Court to vindicate its authority and effectuate the decree it entered in *Price*.

The principles articulated by this Court in *Kokkonen* and *Peacock* thus strongly support the exercise of ancillary jurisdiction here. To be sure, the ultimate decision in *Peacock*, applying those principles, was to deny jurisdiction. But the facts of *Peacock* are very different from the facts here. After obtaining a judgment in an ERISA case, the respondent in *Peacock* brought a new suit in federal court against a third party alleging a conspiracy to prevent satisfaction of that judgment. *See Peacock*, 516 U.S. at 351-52. There was no independent basis of federal jurisdiction over that conspiracy claim. This Court held that there also was no ancillary jurisdiction. *See id.* at 354-55. In the Court's view, ancillary enforcement jurisdiction over subsequent proceedings did

not extend so far as to impose an obligation or to enforce a judgment upon a third party "not already liable for that judgment." *Id.* at 357. Rather, ancillary enforcement jurisdiction is confined to proceedings brought "to execute, or to guarantee eventual executability of, a federal judgment." *Id.* In addition, the Court further warned against the exercise of ancillary jurisdiction over proceedings that are "entirely new and original," *id.* at 358, noting that the new *Peacock* case was founded upon different facts than the first ERISA suit and entirely new theories of liability. *Id.*

Unlike the situation in *Peacock* itself, the assertion of ancillary jurisdiction here involves a direct effort to enforce the plain terms of a prior judgment upon a party who is manifestly bound by that judgment. To begin with, this suit involves precisely the same parties as the original action — a participant and intervenor in the settlement in the prior action and the settling defendant in that case. *See Henson*, 261 F.3d 1066-67. Second, the plaintiff in this case violated the District Court's explicit order dismissing the precise claims the plaintiff asserted. Third, unlike the situation in *Peacock*, the original suit here has not terminated. In *Peacock*, the district court entered judgment in the ERISA action and the case ended. In this case, by contrast, the District Court *retained jurisdiction*, and the case thus endures. The action is therefore not "entirely new and original." *Peacock*, 516 U.S. at 358 (internal quotations and citations omitted). Although characterized as a new action by plaintiffs in order to avoid the judgment in *Price* extinguishing their claim, in substance it is nothing more than a continuation of the original action.[5]

5. A plaintiff may not, by artful pleading, avoid a federal court's assertion of ancillary jurisdiction or its invocation of the All Writs Act to enforce its judgments. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998), is not to the contrary. The question in *Rivet*, a (Cont'd)

Moreover, because the Court of Appeals misperceived the issue as whether the All Writs Act could confer jurisdiction absent any preexisting source of jurisdictional authority, the cases relied upon by the Court of Appeals do not govern here. In *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813), for example, the circuit court lacked authority to address the mandamus application before it because the petitioner framed that application as an original proceeding before the circuit court, not as a means of enforcing or protecting the court's jurisdiction "otherwise obtained." *See Bd. of County Comm'rs of Labette Co., Kan. v. United States ex rel. Moulton*, 112 U.S. 217, 221 (1884) ("[T]he writ [of mandamus] issues out of [circuit courts] only in aid of a jurisdiction previously acquired."); *see also United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977). In this case, however, the defendant sought removal explicitly as a means of enforcing the district court's jurisdiction over its dismissal order, not as an entirely independent proceeding.

Similarly, in *Clinton v. Goldsmith*, 526 U.S. 529, 535-36 (1999), the relief sought under the All Writs order evinced no logical connection with the pre-existing jurisdiction of the issuing court, the Air Force Court of Criminal Appeals ("CAAF"). By statute, the jurisdiction of the CAAF was

(Cont'd)
case purportedly arising under federal law within the meaning of 28 U.S.C. § 1331, was whether "removal may be predicated on a defendant's assertion that a prior federal judgment has disposed of the entire matter and thus bars plaintiffs from later pursuing a state-law based case." 522 U.S. at 472. The defendants in that case asserted that jurisdiction lay under § 1331 on the basis of a purely defensive plea raised in the state court proceeding. Neither the defendant nor the district court raised the All Writs Act as a basis for removal, nor had the district court in the prior federal action retained jurisdiction to enforce its orders. *Rivet* thus did not involve, as this case does, invocation of the expressly retained jurisdiction of a federal court in the prior action upon which the removal was based.

expressly limited to review of the findings and sentence of a court-martial. The application by the respondent service-member for extraordinary relief in that case sought review of an executive action of the Air Force in removing his name from the Air Force rolls. *See id.* Accordingly, the Court found that the relief sought was not "in aid of" the CAAF's existing (or potential) jurisdiction. *Id.* By contrast, in this case, the respondent's initiation of an action barred by the district court's order was linked directly to the court's retained jurisdiction over that order. The relief sought here has a logical nexus to, and is "in aid of," the Court's existing jurisdiction.

In sum, it is far too facile to deny the authority to remove a case based on the notion that the All Writs Act cannot confer "independent" jurisdiction. The All Writs Act need not confer "independent jurisdiction" over the removed action, but merely supply the statutory authority to bring before the district court a case over which it possesses ancillary enforcement jurisdiction. Accordingly, there is no jurisdictional obstacle to using the All Writs Act to protect and effectuate those orders through removal of a state court action.

II. Removal Is An Appropriate Exercise Of Authority Under The All Writs Act To Effectuate The District Court's Prior Judgment.

A. *The All Writs Act Supplements Section 1441*

This Court has held that the All Writs Act fills "the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 41 (1985); *see also New York Tel.*, 434 U.S. at 172-73. The Court of Appeals below overlooked this function of the All Writs Act when

it concluded that 28 U.S.C. § 1441(a) exhausts the circumstances under which removal is permitted, as have those commentators who have disapproved of removal pursuant to the All Writs Act. *See* Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. Pa. L. Rev. 401, 435-37 (1999); Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. Rev. 773, 820-21 (2000).

The argument mounted by some defenders of the Court of Appeals' position, that the specification of conditions for removal in Section 1441 reflects legislative intent to preclude removal under the All Writs Act, implicitly invokes the canon of construction *expressio unius est exclusio alterius* — what is not included is excluded. *See Henson*, 251 F.3d at 1071; *cf. Texas v. Real Parties in Interest*, 259 F.3d 387, 393-94 (5th Cir. 2001) (concluding that it would be "bold indeed" to read the All Writs Act to permit removal where not otherwise permitted by § 1441). This Court, however, has cast a skeptical eye on the *expressio unius* canon because it rests on the improbable inference that Congress, by its silence, implicitly considered — and rejected — other legislative alternatives. *See Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 703 (1991) ("the principle *expressio unius est exclusio alterius* 'is a questionable one in light of the dubious reliability of inferring specific intent from silence'") (quoting Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2109 n.182 (1990)); Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 813 (1983) ("The canon expressio unius is . . . based on the assumption of legislative omniscience. . . .").

Two possibilities here are far more likely than this far-fetched assumption. The first is that in enacting the removal statutes applicable in the broad run of cases, Congress simply

did not contemplate extraordinary circumstances such as those presented here. As a unanimous Court recently explained when rejecting the *expressio unius* maxim in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 487 (1999), "[n]ow and then silence is not pregnant." Second, Congress may have assumed that it had allowed for those extraordinary circumstances in the All Writs Act, the very purpose of which is to afford judicial remedies where not otherwise authorized by statute.

The analogy to the federal appellate courts' mandamus power demonstrates the limitations of the *expressio unius* principle in interpreting the All Writs Act. In 28 U.S.C. §§ 1291 and 1292, Congress delimited the courts of appeals' appellate jurisdiction, over both final judgments and interlocutory orders. Yet the courts of appeals have long resorted to their mandamus power under the All Writs Act when extraordinary relief is justified and existing statutory bases for appellate jurisdiction are inadequate. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 254 (1957) (rejecting petitioner's argument that the district court's "action can be reviewed only on appeal and not by writ of mandamus, since by congressional enactment appellate review of a District Court's orders may be had only after a final judgment"); *see also* 16 Wright & Miller § 3934.1 ("Writ review that responds to occasional special needs provides a valuable ad hoc relief valve for the pressures that are imperfectly contained by the statutes permitting appeals from final judgments and interlocutory orders.").

In other contexts as well, this Court has rejected efforts to glean some Congressional intent, lurking in other remedial statutes, to constrict use of the All Writs Act. In *FTC v. Dean Foods Co.*, 384 U.S. 597, 599 (1966), for example, the FTC asked the court of appeals to grant a preliminary injunction under the All Writs Act against a merger that allegedly

violated the Clayton Act. The respondents observed that the FTC had previously sought statutory authority to issue injunctions itself or to seek such relief from the district courts. By failing to confer that authority, the respondents argued, Congress intended to deny authority to seek injunctive relief from the court of appeals. *See id.* at 608. The court rejected that argument, stating: "We cannot infer from the fact that Congress took no action at all on the request of the Commission to grant it or a district court power to enjoin a merger that Congress thereby expressed an intent to circumscribe traditional judicial remedies." *Id.* at 609-10; *see also id.* at 609 n.11 (quoting *Helvering v. Hallock*, 309 U.S. 106, 120 (1940), for the proposition that "to give weight to the nonaction of Congress was to 'venture into speculative unrealities'").

Instead, this Court and the courts of appeals have read the All Writs Act to provide the basis for numerous other writs not otherwise specifically authorized by statute. For example, in *United States v. Morgan*, 346 U.S. 502, 512 (1954), the Court held that the writ of coram nobis was available pursuant to the All Writs Act to correct errors "of the most fundamental character" when relief was not otherwise available — *i.e.*, pursuant to the habeas corpus statutes, 28 U.S.C. §§ 2241, 2255. *Id.*; *see also id.* at 506 ("Since this motion in the nature of the ancient writ of coram nobis is not specifically authorized by any statute enacted by Congress, the power to grant such relief, if it exists, must come from the all-writs section of the Judicial Code."). This Court has held that a writ of certiorari may issue even where unauthorized by the statute ordinarily providing for discretionary review of appellate court judgments by this Court. *See McClellan v. Carland*, 217 U.S. 268, 278 (1910) (holding that the power of this Court to issue certiorari pursuant to the contemporary All Writs Act is not limited by § 10 of the court of appeals act, 26 Stat. at L.826, chap. 517).

And the federal courts may issue a writ of supersedeas, even though "there is no express provision in the [court of appeals act] for a *supersedeas* and stay of execution." *In re Claasen*, 140 U.S. 200, 207 (1891). *See also Hills & Co. v. Hoover*, 220 U.S. 329, 337 (1911) (explaining that the contemporary All Writs Act authorizes a writ in the nature of replevin); *Wayman v. Southard*, 23 U.S. 1, 23 (1825) (Marshall, J.) (explaining that the contemporary All Writs Act authorizes a writ of execution). Similarly, removal is nothing more than another form of writ authorized by 28 U.S.C. § 1651 to provide relief where other statutory mechanisms are found insufficient.[6]

Indeed, that Congress did not explicitly provide for removal in the particular circumstances here, far from counseling against use of the All Writs Act, actually supports it. As noted, the very purpose of All Writs Act is to fill the gaps left by explicit statutory grants of authority. As this Court explained in *Pennsylvania Bureau of Correction*, "[t]he All Writs Act is a residual source of authority to issue writs *that are not otherwise covered by statute*." 474 U.S. at 43 (emphasis added). Thus, for example, in *New York Telephone Company*, the absence of appropriate statutory means to implement pen register orders, among other things, led the

6. Both of the essential components of removal are, at base, procedures available by the issuance of writs that have long been accepted by this Court as properly authorized under the All Writs Act. The requirement that the state court cease proceedings upon filing of the petition for removal has the same practical effect as an injunction against the prosecution of that action. And the power of the federal court to compel the parties or the state court to file with it a copy of the record of the proceedings may similarly be analogized to the traditional writ of certiorari. In fact, the removal statute expressly invokes that analogy. *See* 28 U.S.C. § 1447(b) ("The [district court] may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it *by writ of certiorari* issued to such State court.") (emphasis added).

Court to affirm use of the All Writs Act to compel third parties to install the devices. *See* 434 U.S. at 175. ("[W]ithout the Company's assistance [as required by the All Writs Act order in question] there is no conceivable way in which the surveillance authorized by the District Court could have been successfully accomplished."). That same result should follow here.

B. *Removal Intrudes Less on the Prerogatives of the State Court than an Injunction and Should Be an Available Remedy*

The Court of Appeals embraced a false dichotomy when it concluded that removal jurisdiction was not "necessary" to protect the District Court's injunction due to the "ready remedy" of injunctive relief pursuant to the All Writs Act. *See Henson*, 261 F.3d at 1071. This holding confuses the threshold standard for invoking the All Writs Act with the determination of which remedy under the Act is appropriate once that threshold test is satisfied.

In order for extraordinary relief to be appropriate under the Act, there must be a showing of necessity, in that statutory procedures apart from the All Writs Act cannot afford the requisite relief. *See Pennsylvania Bureau of Corr.*, 474 U.S. at 43. But neither the statute nor this Court's decisions hold that, when that showing has been made and extraordinary relief is indeed justified under the All Writs Act, a district court is restricted to only one of the extraordinary remedies the statute provides. The Act, as noted, empowers federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). It does not distinguish among those writs, preferring one to another.

To be sure, federal courts do have authority under the All Writs Act and the Anti-Injunction Act, 28 U.S.C. § 2283,

to enjoin state court lawsuits where necessary or appropriate to protect and effectuate their judgments. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146-47 (1988) (explaining the authority of a federal court to enjoin pending state court proceedings that seek to relitigate its judgments).[7] But it is not clear why the Court of Appeals regarded such an injunction as so far superior to removal across the board. In an injunction proceeding, as in a removal, the parties still must appear before the federal forum to litigate the propriety of that relief, even if in some metaphysical sense the underlying "case" is not before that court. Further, the parties to an injunction proceeding generally must present the federal court with relevant portions of the record in the state court to support or refute the need for injunctive relief. In fact, in order to facilitate its determination of the case, the federal court can order production of the entire record, just as the record must be transferred in a removal proceeding. And in issuing an injunction, the federal court can even go so far as to decide the case, in the sense that it can direct the parties to dismiss it, or to drop or modify certain claims.

If anything, removal disturbs the comity between state and federal courts *less* than an injunction does. Enjoining a lawsuit in state court, while sometimes necessary, has long been recognized as a significant intrusion on the prerogatives of state courts. For that reason, Congress enacted the Anti-Injunction Act strictly limiting the circumstances in which

7. The lower federal courts have on numerous occasions employed anti-suit injunctions to protect or effectuate federal court jurisdiction pursuant to the All Writs Act and Anti-Injunction Act in the context of pending or potential comprehensive class action settlements such as the one at issue in this case. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 361 (3d Cir. 2001); *In re VMS Secs. Litig.*, 103 F.3d 1317, 1324 (7th Cir. 1996); *In re Baldwin-United Corp.*, 770 F.2d 328, 333 (2d Cir. 1985); *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1334 (5th Cir. 1981).

such relief is available. *See* 28 U.S.C. § 2283; *see also Younger v. Harris*, 401 U.S. 37, 45 (1971) (setting forth "some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions"). By contrast, removal is a common, well-established, and even routine mechanism. It was part of the Federal Judiciary Act of 1789. *See* 13 Wright & Miller § 3521; Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80 (1789). Parties have removed thousands of cases since then, without creating undue friction between state and federal courts and without a line of removal cases expressing grave concern about comity or imbalance in federal-state relations. While a removal petition does halt proceedings in state courts in the same manner as an injunction, it simply does not carry the same connotations of untoward interference with state court proceedings that can accompany an anti-suit injunction. As the Second Circuit Court of Appeals has concluded, when compared to injunctive relief the "[u]se of the All Writs Act . . . to effectuate removal thus seems to us to be a less drastic, and therefore preferable, result." *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 864 (2d Cir. 1988); *see also Younger*, 401 U.S. at 44 (explaining that under "Our Federalism," federal interests should be vindicated "in ways that will not unduly interfere with the legitimate activities of the States.").

The differing level of intrusiveness in state court proceedings could assume even greater import with the advent of "back-end" opt-out rights in the post-*Amchem* era. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). As noted, to address the concerns the Court expressed in *Amchem* about binding claimants whose injuries may arise or worsen in the future, litigants have negotiated back-end opt-out rights in connection with class action settlements,

enabling claimants to exit the settlement and to pursue claims in the tort system should their medical condition change over time. *See In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, MDL No. 1203, Civ. No. 99-20593, 2000 WL 1222042, at *20 (E.D. Pa. Aug. 28, 2000); *see also Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir. 1996) (subsequent history omitted) (explaining that class members would probably desire a delayed opt out where uncertainty exists as to future harm). Indeed, such back-end opt-out rights are not merely a valuable feature in such settlements; their use has also been hailed as a "fundamental shift" in the manner in which mass torts may be resolved through class settlements. *See* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 Harv. L. Rev. 747, 756 (2002).

Because settling defendants must secure some benefit in exchange for providing class members with the right to later proceed in the tort system, such back-end opt-outs are, by their nature, limited in certain respects. For example, they may allow plaintiffs to bring certain claims but not others. *See id.* at 757. This, in consequence, creates significant potential for plaintiffs to join permissible with impermissible claims. Restricting the federal courts to injunctions to enforce these settlements would require them effectively to reach into the state court and conduct "surgery" from afar.

Federal courts, for example, might have to mandate specific amendments to class members' complaints so that the complaints comply with any restrictions imposed by the settlement agreement on such "later opt-out" class members' claims. Or the federal court might have to direct the dismissal of certain counts and not others. Or it might need to enjoin particular arguments by the parties. In general, the federal court might have to re-mold the suit in accordance with the prior orders of the court. *Cf. In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 363 (3d Cir. 2001) (enjoining litigant from pursuing particular discovery or presenting specific evidence in a state court action when doing so would violate a release of certain claims effected by a prior federal class action settlement). By contrast, when such a purported back-end opt-out case is removed from state court, the federal court no longer has to delve into the state court proceedings to fashion appropriate relief. The federal court that retained jurisdiction to enforce the settlement, and that is most familiar with the terms of that settlement, simply brings the case before it, eliminating the need to intrude into a case pending before a state court judge.[8]

A hypothetical example illustrates the potentially greater intrusion on the dignitary interests of state courts posed by injunctive relief compared to removal. Suppose a mass tort class action settlement in federal court provided for back-end opt-outs for class members who later contracted cancer as a result of exposure to the subject products — but prohibited the class members from pursuing punitive damages or claims other than the cancer claim. Suppose further that after exercising such a back-end opt-out, a class member filed a state court claim alleging a blood disorder and cancer, seeking punitive as well as compensatory damages. If the defendant could only seek injunctive relief from the federal court rather than removal, the federal court might find it necessary to fashion an order striking claims related to the blood disorder and punitive damages. Moreover, the court might also have to edit the factual allegations in the complaint and other pleadings providing the bases for such impermissible claims. In addition, the federal court might have to order limitations on discovery regarding the impermissible claims, as well as to enjoin the class member

8. If the case is not removed initially to the Court that issued the original judgment, it may be transferred there pursuant to 28 U.S.C. § 1404(a) or § 1407.

from raising arguments relating to them. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355 (3d Cir. 2001).

Administering such an injunction would entangle the federal court with the state court proceeding in a manner that imperils comity far more than removal would. Indeed, the federal court might have to struggle to avoid "micro-management" of the state proceeding. For example, if the federal court limited discovery relating to prohibited claims, it could undermine the state court's control over the discovery process. Further, it could present logistical problems for the state court in managing its docket, as it awaited resolution of questions by the federal court before it could proceed with its own tasks. And such entanglement by the federal court could risk inconsistent orders were plaintiffs to move to compel discovery responses in state court while defendants sought protective orders in federal court. In short, the situation presents significant potential for confrontation and confusion.

Of course, in some situations, the federal court might find itself better able to protect its jurisdiction and the continuing effectiveness of its orders through injunctive relief rather than removal. But that determination will depend on the particular facts and circumstances of each case. It is therefore best consigned to the discretion of the district courts. Particularly given the functional similarities between removal and injunctive relief, it would elevate form over substance to deny such discretion, and to preclude a court from considering either alternative. As this Court has held, "dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274 (1942). Such formalism is particularly inappropriate here because removal may be not only more effective and efficient,

but also more conducive to the comity that ought to characterize relations between state and federal courts. In sum, nothing in any federal statute or policy cabins the discretion of federal courts in their choice of remedies under the All Writs Act.

CONCLUSION

For those reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

ROBERT N. WEINER
Counsel of Record
DANIEL S. PARISER
JONATHAN P. HOOKS
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

HUGH YOUNG
JONATHAN HARRISON
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
Suite 510
1850 Centennial Park Drive
Reston, Virginia 22091

Attorneys for Amicus Curiae

APPENDIX

APPENDIX

APPENDIX A — CORPORATE MEMBERS OF PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M

Allegiance Healthcare Corporation

Altec Industries

American Suzuki Motor Corporation

Andersen Corporation

Anheuser-Busch Companies

Ansell Healthcare, Inc.

Appleton Papers, Inc.

Aventis Pharmaceuticals Inc.

BASF Corporation

Baxter International, Inc.

Bayer Corporation

BIC Corporation

Biro Manufacturing

Black & Decker (U.S.) Inc.

BMW of North America, LLC

Bombardier Recreational Products

BP Amoco Corporation

Bridgestone/Firestone, Inc.

Briggs & Stratton Corporation

Bristol-Myers Squibb Company

Brown and Williamson Tobacco

Brown-Forman Corporation

Brunswick Corporation

C. R. Bard, Inc.

Caterpillar Inc.

Chevron Corporation

Compaq

Continental Tire North America, Inc.

Cooper Tire and Rubber Company

Coors Brewing Company

Crown Equipment Corporation

DaimlerChrysler Corporation

Dana Corporation

Deere & Company

E & J Gallo Winery

E. I. DuPont de Nemours Company Inc. and Company

Eaton Corporation

Eli Lilly and Company

Emerson Electric Co.

Engineered Controls International, Inc.

Estee Lauder Companies

ExxonMobil Corporation

Appendix A

FMC Corporation

Ford Motor Company

General Electric Company

General Motors Corporation

Georgia-Pacific Corporation

GlaxoSmithKline

Great Dane Limited Partnership

Guidant Corporation

Harley-Davidson Motor Company

Harsco Corporation, Gas & Fluid Control Group

Honda North America, Inc.

Hyundai Motor America

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Johnson & Johnson

Johnson Controls, Inc.

Joy Global Inc.

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kolcraft Enterprises, Inc.

Kraft Foods North America, Inc.

Lincoln Electric Holdings, Inc.

Mazda (North America), Inc.

Medtronic, Inc.

Mercedes-Benz of North America, Inc.

Michelin North America, Inc.

Miller Brewing Company

Mitsubishi Motors R & D of America, Inc.

Niro Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

Otis Elevator Company

PACCAR Inc

Panasonic

Pentair, Inc.

Pfizer Inc.

Pharmacia Corporation

Philip Morris Companies Inc.

Polaris Industries, Inc.

Porsche Cars North America, Inc.

Raytheon Aircraft Company

Rheem Manufacturing

Appendix A

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Sears, Roebuck and Co.

Shell Oil Company

Siemens Corporation

Smith & Nephew, Inc.

Snap-on Incorporated

Sofamor Danek, Medtronic Inc.

Solutia Inc.

Sturm, Ruger & Company, Inc.

Subaru of America, Inc.

Sunbeam Corporation

Synthes (U.S.A.)

Textron Inc.

The Boeing Company

The Dow Chemical Company

The Goodyear Tire & Rubber Company

The Heil Company

The Procter & Gamble Company

The Raymond Corporation

The Sherwin-Williams Company

The Toro Company

Thomas Built Buses, Inc.

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Inc.

UST (U.S. Tobacco)

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Water Bonnet Manufacturing, Inc.

Whirlpool Corporation

Wilbur-Ellis Company

Wyeth

Yamaha Motor Corporation, U.S.A.

Zimmer, Inc.

(6)

Supreme Court, U.S.
FILED
JUN 4 2002
OFFICE OF THE CLERK

No. 01-757

In The
Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC., ROBERT BABB, EDEE TEMPLET, and KENNETH A. DEVUN,

Petitioners,

v.

HURLEY HENSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENT

ARTHUR H. BRYANT
TRIAL LAWYERS FOR PUBLIC JUSTICE
One Kaiser Plaza
Suite 275
Oakland, CA 94612
Telephone: (510) 622-8150

MICHAEL J. QUIRK
TRIAL LAWYERS FOR PUBLIC JUSTICE
1717 Massachusetts Ave. NW
Suite 800
Washington, DC 20036
Telephone: (202) 797-8600

ADAM SAMAHA
Counsel of Record
ROBERTA B. WALBURN
MARTHA K. WIVELL
ROBINS, KAPLAN, MILLER & CIRESI, L.L.P.
2800 LaSalle Plaza
800 LaSalle Ave.
Minneapolis, MN 55402-2015
Telephone: (612) 349-8500

Attorneys for Amicus Curiae

BEST AVAILABLE COPY

35 pages

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of *Amicus Curiae*	1
Statement of the Case	2
Introduction	3
Summary of Argument	6
Argument	7
I. The Removal Statutes Prohibit Removal Under These Circumstances	7
A. Petitioners Invoked the Advantages, But Failed to Satisfy the Conditions, of the Removal Statutes	7
B. The All Writs Act Is No Cure for the Absence of Original Jurisdiction	9
C. Ancillary Enforcement Jurisdiction Is No Cure	10
II. The All Writs Act Does Not Provide Any Removal Authority.	13
A. Evidence of Original Intent Bars Removal	14
B. Contemporary Law Confirms the Conclusion	16
C. Removal Is Unnecessary to Protect the Federal Judiciary Or Defendants' Interests	19
1. State-court defense	20
2. Anti-suit injunctions	21
Conclusion	26

TABLE OF AUTHORITIES

Page

CASES:

Adams v. *United States ex rel. McCann*, 317 U.S. 269 (1943).....18

Ahearn v. *Charter Township of Bloomfield*, 100 F.3d 451 (CA6 1996).....12

Allied Chem. Corp. v. *Daiflon, Inc.*, 449 U.S. 33 (1980) *(per curiam)*.....19

Amalgamated Clothing Workers of Am. v. *Richman Bros.*, 348 U.S. 511 (1954).....20

Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997).....4, 18

Atlantic Coast Line R. Co. v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970).....5, 20, 21, 22, 25

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807)..... 5

Carlisle v. *United States*, 517 U.S. 416 (1996) 17, 18

Caterpillar, Inc. v. *Williams*, 482 U.S. 386 (1987) 8, 16

Chicago & A.R. Co. v. *Wiggins Ferry Co.*, 108 U.S. 18 (1883).....21

Chick Kam Choo v. *Exxon Corp.*, 486 U.S. 140 (1988).....3, 20, 21, 22, 23

City of Chicago v. *International College of Surgeons*, 522 U.S. 156 (1997).....12

Clinton v. *Goldsmith*, 526 U.S. 529 (1998).....9, 19

Cohen v. *Reed*, 868 F. Supp. 489 (E.D.N.Y. 1994).....12

County of Imperial v. *Munoz*, 449 U.S. 54 (1980).....25

TABLE OF AUTHORITIES – Continued

Page

Dietzsch v. *Huidekoper*, 103 U.S. (13 Otto) 494 (1880).....10

Donovan v. *City of Dallas*, 377 U.S. 408 (1964)..... 5

Dugas v. *American Surety Co. of N.Y.*, 300 U.S. 414 (1937).....10

In re Federal Skywalk Cases, 680 F.2d 1175 (CA8), *cert. denied*, 459 U.S. 988 (1982) 25

Franchise Tax Bd. of Cal. v. *Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1 (1983)..... 8

FTC v. *Dean Foods Co.*, 384 U.S. 597 (1966).....18, 19, 20

In re Glenn W. Turner Enterprises Litig., 521 F.2d 775 (CA3 1975).....25

Harris v. *Nelson*, 394 U.S. 286 (1969) 18

Henson v. *Ciba-Geigy Corp.*, 261 F.3d 1065 (CA11 2001).....12

Julian v. *Central Trust Co.*, 193 U.S. 93 (1904) 11

Kline v. *Burke Constr. Co.*, 260 U.S. 226 (1922) 5, 25

Kokkonen v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).....3, 5, 10, 20

Kulko v. *Superior Court*, 436 U.S. 84 (1978) 5

La Buy v. *Howes Leather Co.*, 352 U.S. 249 (1957) 18

Lexecon Inc. v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).....4, 18

Local Loan Co. v. *Hunt*, 292 U.S. 234 (1934) 10, 12, 21

McClellan v. *Carland*, 217 U.S. 268 (1910).....18

McClelland v. *Longhitano*, 140 F. Supp. 2d 201 (N.D.N.Y. 2001) 12

TABLE OF AUTHORITIES – Continued

Page

Mesa v. *California*, 489 U.S. 121 (1990) 16

Milwaukee & Minn. R.R. Co. v. *Soutter*, 69 U.S. (2 Wall.) 609 (1865) 11

Missouri v. *Jenkins*, 495 U.S. 33 (1990) 11

Mitchum v. *Foster*, 407 U.S. 225 (1972) 21

Oklahoma Tax Comm'n v. *Graham*, 489 U.S. 838 (1989) *(per curiam)* 8, 17

Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) 4, 21, 25

Parsons Steel, Inc. v. *First Ala. Bank*, 474 U.S. 518 (1986) 20, 23

Peacock v. *Thomas*, 516 U.S. 349 (1996) 10

Pennsylvania Bureau of Corrections v. *United States Marshals Serv.*, 474 U.S. 34 (1985) 16, 17

Pennzoil Co. v. *Texaco, Inc.*, 481 U.S. 1 (1987) 20

Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 21

Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 10

Rivet v. *Regions Bank of La.*, 522 U.S. 470 (1998) 4, 8, 9, 20, 23

Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) 17

Root v. *Woolworth*, 150 U.S. 401 (1893) 11

Rosenbaum v. *Bauer*, 120 U.S. 450 (1887) 9

Sampson v. *Murray*, 415 U.S. 61 (1974) 18

Sebring Homes Corp. v. *T.R. Arnold & Assocs.*, 927 F. Supp. 1098 (N.D. Ind. 1995) 12

TABLE OF AUTHORITIES – Continued

Page

Semtek Int'l Inc. v. *Lockheed Martin Corp.*, 531 U.S. 497 (2001) 21

Shamrock Oil & Gas Corp. v. *Sheets*, 313 U.S. 100 (1941) 8

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 13

Stone v. *Powell*, 428 U.S. 465 (1976) 20

Supreme Tribe of Ben Hur v. *Cauble*, 255 U.S. 356 (1921) 10

In re Estate of Tabas, 879 F. Supp. 464 (E.D. Pa. 1995) 12

Tafflin v. *Levitt*, 493 U.S. 455 (1990) 20

Toucey v. *New York Life Ins. Co.*, 314 U.S. 118 (1941) 5, 23

United States v. *FMC Corp.*, 84 S.Ct. 4 (1963) (Goldberg, J., in chambers) 17

United States v. *Morgan*, 346 U.S. 502 (1954) 18

United States v. *New York Tel. Co.*, 434 U.S. 159 (1977) ..... *passim*

United States Alkali Export Ass'n v. *United States*, 325 U.S. 196 (1945) 17

Vendo Co. v. *Lektro-Vend Corp.*, 433 U.S. 623 (1977) 25

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) 5

Younger v. *Harris*, 401 U.S. 37 (1971) 21

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 21

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

An Act to establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789) 15

9 U.S.C. §205 17

12 U.S.C. §632 17

12 U.S.C. §1819 17

22 U.S.C. §286g 17

28 U.S.C. §1367 ..... 12, 14

28 U.S.C. §1441 ..... *passim*

28 U.S.C. §1442 17

28 U.S.C. §1442a 14

28 U.S.C. §1443 17

28 U.S.C. §1444 17

28 U.S.C. §1445 17

28 U.S.C. §1446 ..... *passim*

28 U.S.C. §1447 ..... 8, 14, 17

28 U.S.C. §1448 17

28 U.S.C. §1449 17

28 U.S.C. §1450 17

28 U.S.C. §1451 17

28 U.S.C. §1452 17

28 U.S.C. §1651 ..... 3, 17, 13, 16, 17

28 U.S.C. §2283 ..... 18, 21, 22, 25

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. §2679 17

39 U.S.C. §409 17

RULES:

Fed. R. Civ. P. 23 4

Fed. R. Civ. P. 65 21

Supreme Court Rule 37.3 1

BILLS:

H.R. 2341, 107th Cong. (2001) 6

S. 1712, 107th Cong. (2001) 6

OTHER SOURCES:

J. Coffee, Class Wars, 95 Colum. L. Rev. 1343 (1995) 4

R. Fallon, Jr., *et al.*, Hart and Wechsler's The Federal Courts and the Federal System (4th ed. 1996) 14, 16

F. Frankfurter & J. Landis, The Business of the Supreme Court (1928) 14

D. Hensler, Revisiting the Monster, 11 Duke J. Comp. & Int'l L. 179 (2001) 4

L. Hoffman, Removal Jurisdiction and the All Writs Act, 148 U. Pa. L. Rev. 401 (1999) 16

H. Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 Colum. L. Rev. 1148 (1998) 4, 21

TABLE OF AUTHORITIES – Continued

Page

C. Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923).....14

www.classactionreports.com/classactionreports/stats.htm 4

www.uscourts.gov/judbususc/judbus.html 4

INTEREST OF *AMICUS CURIAE*

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation. TLPJ is dedicated to using trial lawyers' skills and strategies to advance the public good. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. TLPJ has filed dozens of *amicus* briefs in support of those objectives.

As part of its effort to ensure the proper working of the civil justice system, TLPJ has fought to preserve injury victims' claims from unconstitutional encroachment, federal preemption, and class action abuse. In fact, TLPJ is the only national public interest law firm that both prosecutes class actions on a broad range of issues *and* has a special project dedicated to fighting class action abuse. One danger posed by large-scale federal class actions involves the temptation for lower federal courts to improperly extend their jurisdiction and interfere with pending state judicial proceedings in the interest of "global peace." We submit this brief to explain why, under our Constitution, laws, and federal system of government, this Court should affirm the judgment of the Court of Appeals and reject petitioners' attempt to manufacture removal jurisdiction.[1]

---

[1] Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members or its counsel, have made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief under Supreme Court Rule 37.3(a). Copies of those consents have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Respondent and others filed a tort suit against petitioners in a Louisiana state trial court in 1993. A putative class action, the suit sought compensation for exposure to chemicals at a particular Louisiana facility. The claims arose under state law and the individual defendants defeated complete diversity of citizenship. In 1994, another putative class action involving similar chemical exposures was filed in an Alabama state trial court. However, that suit ultimately satisfied complete diversity and was removed to an Alabama federal district court later that year. Respondent subsequently intervened in the federal suit, and the Louisiana state court stayed respondent's state suit. J.A. 79. In 1995, the Alabama federal district court simultaneously certified a nationwide class and approved a class-wide settlement. J.A. 88–89. The stipulation of settlement stated that class counsel agreed that respondent's state suit would be dismissed with prejudice. J.A. 36, 38. The court's judgment stated the court would retain jurisdiction over "future performance of, and any claims related to performance of, the Settlement agreement and judgment." J.A. 88.

Three years later, in 1998, class counsel for the federal plaintiffs finally asked the Louisiana state trial court to dismiss respondent's suit. J.A. 75. Respondent's attorney replied that the federal settlement had not settled all of the claims asserted in state court. J.A. 80–85. The trial court stated that it would dismiss respondent's claims regarding one chemical and product, but it granted respondent permission to file an amended petition that would include only unsettled claims. See J.A. 86. Respondent's counsel filed an amended petition in September 1998. J.A. 60.

Dissatisfied with the state court's failure to immediately dismiss the entire suit, petitioners were faced with at least four strategies. The first two were proper; the others were not: (1) argue in state court that the federal decree required dismissal of all claims and, if necessary, appeal;

(2) return to the Alabama federal district court, invoke its ancillary jurisdiction to enforce its prior judgment, see *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994), and request declaratory relief or an injunction ordering respondent to dismiss the state suit, see *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 145–148 (1988); (3) return to the Alabama federal district court, invoke its ancillary enforcement jurisdiction, and request outright removal of the state suit under the All Writs Act, 28 U.S.C. §1651(a); or (4) file a notice of removal in a Louisiana federal district court in accord with the removal statutes, *id.* §§1441 *et seq.*, receive an automatic stay of the state proceedings, see *id.* §1446(d), and assert the All Writs Act and/or ancillary jurisdiction as a cure for jurisdictional and procedural deficiencies.

Petitioners chose strategy (4). On October 13, 1998, they filed a notice of removal in a Louisiana federal district court and a motion for transfer to Alabama, J.A. 58, 65 — even though the parties lacked complete diversity of citizenship, no federal question was presented in the complaint, the state suit commenced years before the notice of removal, and petitioners had not requested a remedy from the federal district court that had approved the settlement.

INTRODUCTION

Although not at historic highs, class actions have become an important part of the federal docket. They can be appropriate and efficient vehicles for resolving disputes involving countless injuries, particularly when each individual injury is relatively small. But there is the potential for abuse at the expense of the "inventory" of individuals who are injured, and those who are not yet injured at all. Class counsel can be too eager to settle on the cheap, provided that attorney fees are sufficiently

attractive.[2] To prevent abuse and to ensure that Congress is involved in any further centralizing of federal litigation, this Court has been sensitive to existing rules and jurisdictional limits. See *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (extension of multi-district litigation transferee court authority is for Congress); *Ortiz*, 527 U.S., at 842, 861–864; *Amchem*, 521 U.S., at 597, 620–622, 628–629 (refusing to extend Fed. R. Civ. P. 23 despite the district court's attempt to help settle "an asbestos-litigation crisis").

This case likewise involves the scope of federal judicial power over class actions, but after a settlement rather than before. Specifically, petitioners and defendants like them are trying to find a way to route back to federal court disputes over whether a prior federal judgment precludes pending state suits. This case is not simply about the authority of a federal court to interpret and enforce its own decrees, however, because defendants are demanding more. What they want is a removal procedure that will immediately, without prior judicial involvement, oust state courts of jurisdiction over state-law claims against non-diverse defendants when a preclusion defense is alleged — at least if a federal court has retained jurisdiction over a settlement of "complex" litigation. Their preferred removal scheme runs into immediate difficulties, of course, because the removal statutes that Congress enacted forbid it, *Rivet*

---

[2] See, *e.g.*, J. Coffee, Class Wars, 95 Colum. L. Rev. 1343 (1995), cited in *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 621 (1997); D. Hensler, Revisiting the Monster, 11 Duke J. Comp. & Int'l L. 179, 189–190 (2001); H. Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 Colum. L. Rev. 1148, 1149, n. 1, 1155–1156 (1998); see also *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846–847, and n. 23 (1999). For statistics on federal class action filings dating back to 1972, visit www.classactionreports.com/classactionreports/stats.htm. More recent data indicating an increase in federal filings is available at www.uscourts.gov/judbususc/judbus.html, in Tables X-4 and X-5 of the posted reports. There is no centralized clearinghouse for data on state court class actions.

v. *Regions Bank of La.*, 522 U.S. 470 (1998), and because of the rather dramatic impact it would have on state proceedings and the claimants therein.

In addition to more specific concerns, three general principles counsel affirmance. First, adherence to the principle of separation of powers requires a narrower scope of federal jurisdiction. Federal courts are tribunals of limited rather than general jurisdiction. *Kokkonen*, 511 U.S., at 377. That jurisdiction is confined both by Article III of the Constitution and by acts of Congress. "[C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807) (Marshall, C.J.). Federal jurisdiction thereby requires an affirmative statutory grant from Congress. *Kokkonen*, 511 U.S., at 377. And the burden of persuasion rests with the party asserting jurisdiction. *Ibid.* It may not be manufactured by judicial creativity or litigant convenience.

Second, American federalism mandates respect for state judicial proceedings, even when a "duty of 'hands off' by the federal courts," *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 132 (1941), seems inefficient. Parallel litigation is an accepted consequence of our dual court system and concurrent jurisdiction. "Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system." *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970); accord *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234–235 (1922). Absent congressionally conferred removal jurisdiction or an exception to the Anti-Injunction Act, neither system may order the other to halt. See *Donovan* v. *City of Dallas*, 377 U.S. 408, 412–414 (1964); *Kline*, 260 U.S., at 234–235.

Third, individuals claiming injury and seeking judicial redress have a legitimate interest in selecting an appropriate forum to adjudicate their grievances, see *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980); *Kulko* v. *Superior Court*, 436 U.S. 84, 92 (1978)

(due process analysis), which should have particular force when wholly state-law claims are asserted in a state court.

There may be legitimate policy arguments for expanding the federal docket to reach more class actions involving state-law claims. Congress is considering legislation along these lines. See H.R. 2341, 107th Cong. (2001); S. 1712, 107th Cong. (2001). But there is no need or authority for this Court to redraw jurisdictional boundaries. The risk of vexatious litigation and erroneous state court decisions under the present system is at least offset by the potential for abuse when grounds for removal are added to the statutes, even if the new grounds are less vague than petitioners' proposal; and it is overwhelmed by respect for Congress as the proper venue for reform proposals, combined with respect for state courts in their duty to adjudicate state-law claims and federal defenses.

SUMMARY OF ARGUMENT

The removal statutes afford particular advantages to those seeking relief, at the expense of orderly state proceedings. But those statutes also impose conditions on removal, at least one of which cannot be satisfied here: a federal defense based on a prior federal decree does not provide the original jurisdiction required for removal under 28 U.S.C. §1441 (Part I.A.). The All Writs Act, petitioners now concede, cannot mend that deficiency (Part I.B.). Nor can ancillary enforcement jurisdiction, which provides federal jurisdiction over certain supplemental enforcement proceedings (Part I.C.).

The analysis can end there, but it is also apparent that the All Writs Act lacks any removal authority. That was surely true as of the Judiciary Act of 1789 (Part II.A.), and later developments and contemporary legal values reenforce the conclusion that the removal statutes govern removal (Part II.B.). Any doubts can be resolved with regard to federalism principles and the adequacy of state court jurisdiction to assess federal defenses to state claims (Part II.C.1.). Finally, the Anti-Injunction Act imposes a

ceiling on any residual removal authority; and although the Act might permit a district court to consider issuing a stay of state proceedings in a case like this, it is a remedy that should always be preferred to the intrusion of petitioners' removal proposal (Part II.C.2.).

ARGUMENT

I. THE REMOVAL STATUTES PROHIBIT REMOVAL UNDER THESE CIRCUMSTANCES.

The question on which this Court granted certiorari tied the outcome of the case to the removal statutes: "Whether the All Writs Act, 28 U.S.C. §1651(a), vests federal district courts with authority to *exercise removal jurisdiction under 28 U.S.C. §1441* . . . ." Pet. for Cert. i (emphasis added). The answer is no, and it is no longer clear that petitioners disagree.

A. Petitioners Invoked the Advantages, But Failed to Satisfy the Conditions, of the Removal Statutes.

The general removal statutes are exceptional for the procedural advantages that they confer upon those seeking relief. Within the confined class of cases to which they apply, Congress' policy is to grant relief first and permit state court plaintiffs to ask questions later. First, the statutes provide that the federal district court in which the notice of removal is filed assumes jurisdiction immediately upon proper filing and service of the notice. 28 U.S.C. §1446(a)–(b), (d). Unlike attempts to remove state criminal prosecutions, §1446(c)(4), the statute does not provide for federal judicial screening as state civil actions are removed. Second, proper filing and service of a removal notice triggers an automatic stay of state civil proceedings. The state court from which the action has been removed "shall proceed no further unless and until the case is remanded." §1446(d); see also §1447(c). Finally and consequently, the onus is on the plaintiff to file a motion seeking

remand to state court. See §1447(c). But cf. *ibid.* (recognizing district courts' obligation to remand for lack of subject matter jurisdiction); §1447(d) (limiting appellate review of remand orders). Invoking the removal statutes is therefore an attractive option for state court defendants like petitioners who desire federal judicial involvement. But cf. §1447(c) (remand orders may include an award of attorney fees).

Yet accompanying these advantages are certain conditions, which must be honored. Any circumvention of these conditions disturbs the federal-state balance that Congress selected, permits federal courts to assume jurisdiction that is the legislature's to give, and inappropriately extinguishes state jurisdiction over state claims. See, *e.g.*, *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 108 (1941) (referring to removal as "a right which can only be conferred by Act of Congress"); see also *Oklahoma Tax Comm'n* v. *Graham*, 489 U.S. 838, 841–842 (1989) *(per curiam)*; *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 (1983). As much as or more than any issue of federal jurisdiction, the removal statutes are rightly subject to a rule of strict construction. *Shamrock Oil*, 313 U.S., at 108–109.

Most important for present purposes, only civil actions of which the federal district courts have "original jurisdiction" are potentially removable under §1441(a). See also §1441(b). In other words, §1441 reaches only those state suits that could have been filed in federal district court in the first place. *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392–393 (1987). That condition cannot be satisfied here. Diversity of citizenship was incomplete, a federal question did not appear on the face of respondent's well-pleaded complaint, and federal defenses are incapable of satisfying the original-jurisdiction condition in §1441. See *Rivet*, 522 U.S., at 472, 475–478 (distinguishing cases where federal law completely preempts state-law claims and replaces them with federal claims); *Caterpillar*, 482 U.S., at 392–393, 398–399.

A tight analogue is *Rivet*. The state court defendants in that case contended that removal was justified because a prior federal judgment assertedly extinguished the plaintiffs' claims in their entirety. 522 U.S., at 472. But the "fundamental [rule] under currently governing legislation" is that federal defenses cannot provide jurisdiction for removal under §1441. *Id.*, at 478. The same result should obtain in this case. *Rivet*'s holding and congressional policy would be flouted if simple citation of the All Writs Act made any difference; and, as explained below, ancillary enforcement jurisdiction is no answer either. Finally, the *Rivet* Court wisely simplified and hardened the limits on §1441 removal. See *id.*, at 477–478. As such, there can be no exception for prior adjudication of "complex" litigation, or state suits that "threaten the integrity" of prior federal rulings. Brief for Petitioners i. Considering the potential for abuse and the interference with pending state litigation, this Court should maintain relatively clear and clean boundaries for the removal statutes. Petitioners' position sacrifices that clarity along with the principle of limited federal jurisdiction.

B. The All Writs Act Is No Cure for the Absence of Original Jurisdiction.

At times petitioners have suggested that the All Writs Act provides the necessary original jurisdiction. See J.A. 60–62. But petitioners have commendably disavowed any such position here. See Brief for Petitioners 6, 9 (acknowledging that the Act is not an independent basis for federal jurisdiction). The All Writs Act only grants certain writ authority when "in aid of" a federal court's existing jurisdiction conferred by Congress. See, *e.g.*, *Clinton* v. *Goldsmith*, 526 U.S. 529, 534–535 (1999); *Rosenbaum* v. *Bauer*, 120 U.S. 450, 456–459 (1887) (involving removal); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 188, n. 19 (1977) (Stevens, J., dissenting). There can be no rational argument, then, that the All Writs Act somehow repeals the

original-jurisdiction condition for those proceeding under §1441. Removal under that provision was improper.

C. Ancillary Enforcement Jurisdiction Is No Cure.

Petitioners now contend that the Alabama federal district court obtained ancillary enforcement jurisdiction over respondent's Louisiana state suit once the federal settlement was approved and incorporated into the district court's judgment. Even if that argument was properly preserved for review here, it could not justify removal.

Precedent understandably confirms that federal courts possess authority to enforce their judgments. *Peacock* v. *Thomas*, 516 U.S. 349, 356 (1996). Whatever other purposes the federal courts may serve, they must at least be able to adjudicate individual disputes; and adjudication implies resolution with some degree of finality and practical effect. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218–219 (1995); see also *New York Tel.*, 434 U.S., at 188–189 (Stevens, J., dissenting). Federal courts accordingly may retain jurisdiction to exercise this enforcement authority in post-judgment supplementary proceedings. *Peacock*, 516 U.S., at 356–357; see *Kokkonen*, 511 U.S., at 379–381.

But these concepts fall far short of this case. Ancillary "enforcement" jurisdiction permits a federal court to entertain *enforcement* proceedings.[3] Thus the Alabama

[3] See, *e.g.*, *Peacock*, 516 U.S., at 356–357; *Kokkonen*, 511 U.S., at 381 (posing a hypothetical in which the federal district court would have had jurisdiction "to enforce" the settlement agreement); *Dugas* v. *American Surety Co. of N.Y.*, 300 U.S. 414, 420–422, 427–429 (1937) (involving a supplemental bill to enjoin a litigant from further prosecuting an unremovable state suit that would have imposed liability foreclosed by prior federal interpleader decrees); *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 238–242, 244 (1934); *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356, 357–358, 367 (1921); *Dietzsch* v. *Huidekoper*, 103 U.S. (13 Otto) 494 (1880); see also *New York Tel.*, 434 U.S., at 171–178;

(Continued on following page)

federal district court retained jurisdiction to consider a motion by petitioners for declaratory relief, or for an injunction ordering respondent to dismiss his state suit. But petitioners incorrectly equate federal jurisdiction over efforts to *enforce* a federal court's judgment with federal jurisdiction over lawsuits that happen to *violate* that judgment. Whatever the arguable limits to ancillary enforcement jurisdiction, respondent's state suit is obviously not an enforcement action. That the federal district court in this case might have issued orders to halt state litigation does not convert that federal tribunal into a state-court substitute. Under petitioners' theory, could respondent or other parties to the settlement now choose to file non-diverse state-law exposure suits against the federal defendants in Alabama federal district court? If a federal settlement precludes certain administrative claims or requires certain executive branch actions, is the district court then permitted to appropriate those claims or itself discharge those duties? Cf. *Missouri* v. *Jenkins*, 495 U.S. 33, 50–51, 55 (1990) (addressing district court authority to order local property tax increases). The answer must be no.

That petitioners sought *removal* of the state suit only makes matters worse. Neither petitioners nor their *amicus* identify precedent for solely ancillary removal jurisdiction. There is no such beast. For the reasons just stated, §1441(a)'s original-jurisdiction demand could not have been satisfied. Ancillary enforcement jurisdiction at most permits the Alabama federal court to consider whether to halt, not whether to adjudicate, a state suit over which it otherwise lacks jurisdiction.

id., at 188 (Stevens, J., dissenting); *Julian* v. *Central Trust Co.*, 193 U.S. 93, 112–114 (1904); *Root* v. *Woolworth*, 150 U.S. 401, 411–412 (1893); *Milwaukee & Minn. R.R. Co.* v. *Soutter*, 69 U.S. (2 Wall.) 609, 631–635 (1865).

In addition, §1441 is best read to prohibit removal if subject matter jurisdiction depends on a separate federal suit that is already pending in a particular federal district court.[4] It is the "civil action brought in a State court" over which the district courts must have "original jurisdiction." §1441(a). But by definition ancillary jurisdiction is dependant rather than "original" in the sense that the statute uses that term. As well, §1441(a) demands extant original jurisdiction in "the district courts," plural. Accord §1441(b). That phrasing at least implies that the state suit must fall within the subject matter jurisdiction of any federal district court. In contrast, the ancillary enforcement jurisdiction decisions indicate that such jurisdiction resides, if at all, in the one district court with a decree to enforce. See, *e.g.*, *Local Loan*, 292 U.S., at 239. And in cases like this, where the state suit was filed in a place outside the geographic boundaries of the federal district court with asserted ancillary jurisdiction, §1441 removal would require the local federal district court to assume jurisdiction that even defendants would not argue has been retained. See §1441(a) (directing removal to "the district court" (singular) "for the district and division embracing the place where such action is pending"); §1446(a). Transfer can be requested, as it was here. But

[4] This conclusion is regularly followed by lower federal courts in an analogous context: attempts to remove a state suit on the theory that the suit falls within the supplemental jurisdiction attendant to an already pending federal suit. 28 U.S.C. §1367; see, *e.g.*, *Henson* v. *Ciba-Geigy Corp.*, 261 F.3d 1065, 1068, n. 3 (CA11 2001) (case below); *Ahearn* v. *Charter Township of Bloomfield*, 100 F.3d 451, 456 (CA6 1996); *Sebring Homes Corp.* v. *T.R. Arnold & Assocs.*, 927 F. Supp. 1098, 1101–1102 (N.D. Ind. 1995); *In re Estate of Tabas*, 879 F. Supp. 464, 467 (E.D. Pa. 1995); see also *McClelland* v. *Longhitano*, 140 F. Supp. 2d 201, 202–203 (N.D.N.Y. 2001) (state court defendants filed a federal action and simultaneously sought removal under §1367 of the pending state suit); cf. *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156, 165 (1997) (§1367(a) applies when other, federal claims are removed). But see *Cohen* v. *Reed*, 868 F. Supp. 489, 494 (E.D.N.Y. 1994) (nevertheless remanding).

that *exercise* of judicial authority is hardly a substitute for *jurisdiction* to do so in the first place. Cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998) (rejecting hypothetical jurisdiction).

Recognizing a difference between jurisdiction to consider enforcement measures and jurisdiction over state suits alleged to violate prior federal decrees is not splitting hairs. The former maintains the traditional authority of the federal courts to adjudicate requests for relief when otherwise permitted by law. But under petitioners' theory, mere allegations of preclusion in a removal petition can trigger immediate and wholesale interference with ongoing state-court business. Yet defendants cannot be trusted to assert only valid enforcement claims. Granted, in some situations the statutorily authorized grounds for removal may be doubtful. But that situation was one that Congress created. Judicially minted and amorphous extensions of removal jurisdiction, whether under ancillary enforcement jurisdiction or otherwise, should not be tolerated.

II. THE ALL WRITS ACT DOES NOT PROVIDE ANY REMOVAL AUTHORITY.

Petitioners' revision of the question presented does not refer to the removal statutes at all, see Brief for Petitioners i, and their new question might better fit their current theory of the case. Petitioners now assert that the All Writs Act is an additional statutory mechanism with which federal courts may obtain removal jurisdiction over suits within some federal court's ancillary enforcement jurisdiction — at least when that court retained post-judgment jurisdiction over "complex" litigation. As discussed above, federal district courts do not possess ancillary enforcement jurisdiction over state lawsuits that allegedly violate prior decrees. But in addition to that jurisdictional deficiency, there is no unwritten removal mechanism in §1651(a) or anywhere else.

As an initial matter, it is not clear which portions of the removal statutes petitioners are willing to follow and which would be superseded by the All Writs Act. In fact, the All Writs Act was not the (only) "mechanism" that they used. Petitioners relied on the grant of removal jurisdiction to the local federal district court in Louisiana under §1441(a) and they filed their removal notice there, see §1446(a); but they do not explain why that particular court possessed jurisdiction. See Argument Part I.C., *supra*. Likewise, petitioners enjoyed the automatic stay of state proceedings in §1446(d); but they do not explain how defendants in their position can ever file a timely removal notice under §1446(b). Cf., *e.g.*, §§1441(d), 1442a (express exceptions to the timing provision in §1446(b)). Nor do we know whether §1447(c) will govern the procedure for remand motions and orders for attorney fees, or whether such remands will be appealable despite §1447(d).

Regardless of the procedural edifice that petitioners would have federal courts fabricate to answer such questions, the removal statutes represent the sum total of the judiciary's removal authority. This was true from the beginning.

A. Evidence of Original Intent Bars Removal.

We can be quite certain that the initial grant of residual writ authority in 1789 did not include unwritten removal authority. The first Judiciary Act exercised Congress' then-controversial authority to establish lower federal tribunals,[5] and granted all federal courts "power to

[5] See R. Fallon, Jr., *et al.*, Hart and Wechsler's The Federal Courts and the Federal System 19–20, 28–29, 31 (4th ed. 1996) (hereinafter Hart & Wechsler); F. Frankfurter & J. Landis, The Business of the Supreme Court 2, 4, 11–12 (1928); C. Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 53–57, 61–70, 81, 90–92, 119–127, 130–132 (1923).

issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." An Act to establish the Judicial Courts of the United States, ch. 20, §14, 1 Stat. 73, 81–82 (1789).

At the very same time, the Judiciary Act also created federal removal jurisdiction, *id.*, §12, 1 Stat. 79–80, an innovation within our unique system of co-existing state and federal power. As now, the founding era removal jurisdiction included several significant limitations, which are understandable in light of its novelty and intrusion into state prerogatives. Thus removal was confined to a specified class of cases, such as those involving a plaintiff suing an out-of-state defendant in the plaintiff's home state if the amount in controversy exceeded $500. *Id.*, at 79. As well, removal was proper only to the local circuit court (excepting Maine and Kentucky, which had no separate circuit courts), rather than to a district court or to this Court. *Ibid.* Removal premised on federal questions was not authorized at all.

It is inconceivable that removal authority beyond §12 was lodged in §14. The former provision specifically and meticulously addressed the subject of removal, the classes of cases eligible therefor, and the procedure by which removal would be effectuated. Having described the eligible cases, Congress could not have intended the same Act to extend this novel ouster of state jurisdiction by mere ambiguity. Cf. *id.*, §§9, 11, 1 Stat. 76–79 (providing instances of exclusive jurisdiction in the lower federal courts). Furthermore, if any removal authority existed in §14, could removal have been premised on a federal question despite Congress' decision to withhold general federal question jurisdiction (whether by removal or otherwise)? And which federal courts could have exercised it and by what procedure? The All Writs authority was granted to every federal court, while Congress made

conscious decisions to restrict removal venue and procedure. Nothing in the original statute or its context suggests that these legislative choices could be trumped by the residual writ authority included in the same piece of legislation. Indeed our system survived for nearly two centuries without a single federal court assuming removal authority under the All Writs Act. See L. Hoffman, Removal Jurisdiction and the All Writs Act, 148 U. Pa. L. Rev. 401, 401–402 (1999).

B. Contemporary Law Confirms the Conclusion.

No intervening event suggests that All Writs removal authority has sprouted since 1789. The All Writs statutory phrasing has changed only slightly over that period; since 1948 it has granted federal courts authority to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a); see *Pennsylvania Bureau of Corrections* v. *United States Marshals Serv.*, 474 U.S. 34, 40–42 (1985) (concluding that the 1948 recodification did not "mark a congressional expansion of the powers of federal courts to authorize issuance of any 'appropriate' writ").

As for removal, over time Congress has expanded and contracted the authority depending on contemporary necessities. Responding to acute threats to federal power while cognizant of the impact on state and federal dockets, the Legislative branch has been the prime arbiter of removal authority. And this Court's consideration of removal authority has been bounded by those statutes. See, *e.g.*, *Mesa* v. *California*, 489 U.S. 121, 125–126, 135, 139 (1989) (addressing federal officer removal); *Caterpillar*, 482 U.S., at 399 (addressing §1441's original-jurisdiction condition); see generally Hart & Wechsler, *supra*, at 951–952, 1615–1616 (providing a history of legislative amendments to the removal statutes).

The better conclusion, therefore, is that Congress has exhausted the mechanisms for removal by statute. The United States Code is now littered with statutory provisions expressly addressing removal of cases from state to federal court in a variety of circumstances. The All Writs Act is not one of them. See, *e.g.*, 9 U.S.C. §205; 12 U.S.C. §§632, 1819(b)(2)(B)–(D); 22 U.S.C. §286g; 28 U.S.C. §§1441–1452, 2679(d)(2)–(3); 39 U.S.C. §409(a). As significant, petitioners cite no case in which this Court has implied removal authority from a statute that did not expressly provide for it. Accord *Oklahoma Tax Comm'n*, 489 U.S., at 841 ("Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities").

With congressional policy ascertained, All Writs analysis must end. The All Writs Act cannot trump congressional intent to limit removal authority. And, in addition, writs otherwise "'covered'" by statute are not available under §1651(a). *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (quoting *Pennsylvania Bureau*, 474 U.S., at 43); see also *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 29–32 (1943); *United States* v. *FMC Corp.*, 84 S.Ct. 4, 5–6, 8 (1963) (Goldberg, J., in chambers); cf. *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 202–204 (1945) (enforcing by writ a congressional policy limiting federal jurisdiction). "Where a statute," let alone a bevy of them, "specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pennsylvania Bureau*, 474 U.S., at 43.

Finally, federalism concerns should resolve any doubts against All Writs authority. Not only are the removal statutes sufficiently comprehensive to foreclose supplementation, but judicial expansion of removal authority improperly impinges on state judicial business. Removal does not just obstruct state courts in their obligations to timely adjudicate state-law claims. It utterly and (under

§1446(d) or some phantom All Writs companion) immediately deprives them of jurisdiction. Congress and the Court are well aware of that consequence, and in defining the scope of the removal statutes both institutions have respected the interests of state judiciaries and their claimants.[6] An alleged "crisis" is no occasion for the judiciary to re-mark boundaries on its own power. See *Lexecon*, 523 U.S., at 40; *Amchem*, 521 U.S., at 628–629.

There may be no simple and comprehensive way to state exactly when resort to the All Writs Act is appropriate. But essential elements in the equation must include deference to congressional choices and respect for state judiciaries. Petitioners' argument devalues both.

---

[6] Authorities cited by petitioners and their *amicus* do not confront these concerns. See, *e.g.*, *New York Tel.*, 434 U.S., at 161 (pen-register order to an in-state telephone company); *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966) (preliminary injunction against private parties' merger in part to preserve status quo for agency resolution and subsequent judicial review); *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957) (supervisory authority over lower federal courts); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 272–274 (1943) (habeas corpus after a federal conviction); *United States* v. *Morgan*, 346 U.S. 502 (1954) (coram nobis after a federal conviction); *McClellan* v. *Carland*, 217 U.S. 268 (1910) (certiorari to the federal courts of appeals); cf. *Carlisle*, 517 U.S., at 429 (recent treatment of coram nobis in light of the modern rules of criminal procedure); *Sampson* v. *Murray*, 415 U.S. 61, 76–78 (1974) (distinguishing *Dean Foods*). Obviously the All Writs Act may permit some interference with state interests. See *Harris* v. *Nelson*, 394 U.S. 286, 288–292, 299 (1969) (supplementing expressly granted habeas jurisdiction to adequately assess collateral constitutional claims to liberty). But see 28 U.S.C. §2283 (limiting authority to interfere with pending state suits); Argument Part II.C.2., *infra*. Still, a federal court's legitimate power to issue creative writs must be at low tide when beset by a combination of federalism and separation-of-powers concerns — especially where there are established alternative avenues for seeking more traditional and practically effective relief. See Argument Part II.C., *infra*.

C. Removal Is Unnecessary to Protect the Federal Judiciary Or Defendants' Interests.

Petitioners and their *amicus* attempt to convert the vice of statutory limits into a virtue. They believe that the conditions in the removal statutes actually justify All Writs removal, because the exact relief sought cannot otherwise be obtained.

Precedent indicates that All Writs relief is available only if "necessary" in some sense, and so it is plainly *un*available if other "adequate" remedies exist. See *Clinton*, 526 U.S., at 537; *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980) *(per curiam)* (mandamus to an inferior federal tribunal is barred if the requesting party has any other adequate means to obtain the requested relief); see also *New York Tel.*, 434 U.S., at 175 (arguing necessity from the *court's* perspective); *Dean Foods*, 384 U.S., at 604. But litigant need and restrictions on other statutory authority cannot be a *sufficient* condition for relief. That would be a recipe for disregard of congressional will. Absent a constitutional violation, All Writs relief must be prohibited when Congress so intends. As shown above, the best reading of the removal statutes is that the All Writs Act has been appropriately confined by Congress. *New York Tel.*, 434 U.S., at 172–173.

Moreover, the All Writs Act is not triggered whenever a litigant cannot obtain elsewhere the precise remedy that he has requested. Rough substitutes can bar recourse to the All Writs Act. See *Clinton*, 526 U.S., at 537–540; *Allied Chem.*, 449 U.S., at 36. That petitioners cannot remove respondent's state suit should be irrelevant considering the sole purpose for which they seek relief: to halt a state suit based on a prior federal judgment. Even if petitioners are correct on the merits of their preclusion arguments, there is absolutely no need — from the perspective of either the litigants or of the federal courts — for removal to achieve the objective.

1. State-court defense. Most important, state courts retain the ability and duty to fairly adjudicate defenses like those asserted by petitioners. Indeed, Congress and precedent favor that course to unauthorized removal. See *Rivet*, 522 U.S., at 477–478. State courts are entirely capable of resolving alleged conflicts between federal judgments and pending state suits. They are just as obligated to effectuate federal law as are federal courts, and this Court ordinarily presumes that state courts will follow rather than flout federal law. See, *e.g.*, *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990); *Chick Kam Choo*, 486 U.S., at 149–150; *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 15–17 (1987); *Stone* v. *Powell*, 428 U.S. 465, 493–494, n. 35 (1976); *Amalgamated Clothing Workers of Am.* v. *Richman Bros.*, 348 U.S. 511, 518 (1954). Unlike the situation in cases such as *New York Telephone*, 434 U.S., at 175, and *Dean Foods*, 384 U.S., at 599–600, the underlying controversy turns on state law and a state judicial forum has already acquired jurisdiction — with which it is able to ensure that federal law is vindicated.

While there are legitimate arguments that the court issuing a judgment is the most efficient place to consider its scope, such concerns have never been parlayed into exclusive federal jurisdiction. See *Parsons Steel, Inc.* v. *First Ala. Bank*, 474 U.S. 518, 524–25 (1986) (rejecting an anti-suit injunction where the state court had already denied preclusion); see also *Kokkonen*, 511 U.S., at 381; *Atlantic Coast Line*, 398 U.S., at 287. Even when a dispute over a judgment is close enough in time to the prior adjudication to warrant a presumption that the first court is better prepared than a second, but cf. Brief of Product Liability Advisory Council, Inc. (PLAC) as *Amicus Curiae* 26–29 (posing questions about back-end opt-outs), different judicial systems regularly interpret the preclusive scope of judgments entered by others. And the preclusive effect of a federal district court's judgment when sitting in diversity is only technically a matter of federal common law; the actual rule of decision will almost certainly

incorporate state preclusion rules. See *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 508–509 (2001).

Petitioners are free to defend themselves in state court, and that is no punishment. Fear that state courts will not follow federal law is no ground for removal. *Chicago & A.R. Co.* v. *Wiggins Ferry Co.*, 108 U.S. 18, 24 (1883).

2. Anti-suit injunctions. Based on the argument above, the Court need not consider the authority of the Alabama district court to issue an anti-suit injunction. But the possibility of an injunction and the presence of the Anti-Injunction Act can only undermine the argument for All Writs removal.

First, any authority to remove a case outside of the removal statutes must not be any broader than the authority to issue a stay of state proceedings. To make removal effective, a stay of state proceedings is required (or at least that is what defendants are agitating for). Yet Congress has imposed express limits on such stays in the Anti-Injunction Act. 28 U.S.C. §2283. Although there are a variety of additional restrictions on anti-suit injunctions,[7] the demands of the Anti-Injunction Act must be satisfied or there is no authority to interfere with pending state proceedings "regardless of how extraordinary the particular circumstances may be." *Mitchum* v. *Foster*, 407 U.S. 225, 229 (1972); see, *e.g.*, *Chick Kam Choo*, 486 U.S., at 146; *Atlantic Coast Line*, 398 U.S., at 286–87 (the bar applies even when an injunction is directed at a party rather than a state court). "[S]ince the statutory prohibition against such injunctions in part rests on the

[7] These include personal jurisdiction, due process, abstention, and equitable discretion to deny relief. See, *e.g.*, *Ortiz*, 527 U.S., at 846–848; *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811–812 (1985); *Younger* v. *Harris*, 401 U.S. 37, 43–45 (1971); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969); *Local Loan*, 292 U.S., at 241–242; Monaghan, *supra*, at 1149–1155, 1187–1191; see also Fed. R. Civ. P. 65(d).

fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction." *Atlantic Coast Line*, 398 U.S., at 287; accord *Chick Kam Choo*, 486 U.S., at 146. Doubts about the propriety of an injunction must be resolved in favor of permitting the state courts to move forward without delay. *Atlantic Coast Line*, 398 U.S., at 297.

In cases like this, the defendants' rationale for removal authority (that the state suit is purportedly precluded by a prior federal decree) may establish authority to issue an anti-suit injunction. Section 2283 permits federal courts to consider whether to issue an anti-suit injunction that is "necessary to protect or effectuate the court's judgment." *Chick Kam Choo*, 486 U.S., at 146. This relitigation exception has been narrowly construed: "the claims or issues which the federal injunction insulates from litigation in state proceedings [must] actually have been decided by the federal court," and an injunction can rest only on what the federal court's prior order actually said, not on what it intended to say. *Id.*, at 148. Nevertheless, a preclusion argument like petitioners' might satisfy the relitigation exception; and if that argument fails on its merits, then not even petitioners would contend that removal is authorized. On this logic, petitioners' *amicus* contends that a meritorious preclusion argument triggers both injunctive and removal authority, and district courts should be left with discretion to choose between them.

This argument fails for several reasons. First, in PLAC's view, defendants seeking All Writs removal are apparently entitled to an automatic stay of state proceedings, without prior judicial oversight, upon filing of a removal notice and allegation of preclusion (at least after settlement of "complex" federal litigation). Cf. §1446(d). The "choice" a district court would face after finding that a preclusion defense is meritorious, therefore, would *not* be between an anti-suit injunction and removal, but between

remand with an anti-suit injunction and dismissal. Assuming complete preclusion, the only purpose for remand would be to test whether the state court can obey a federal diktat. And in those cases where the defendant's preclusion defense is *not* meritorious, neither removal nor injunction will be authorized, and so a straight remand will be compelled. But in all events the defendant will have succeeded in obstructing state adjudication and the plaintiff's valid forum choice, based on a federal defense. That is not the way the deck has been stacked by Congress or this Court. See, *e.g.*, *Rivet*, 522 U.S., at 477–478; *Parsons Steel*, 474 U.S., at 524–25.

That aside, removal and anti-suit injunctions are *not* equally available choices. As argued above, federal courts lack subject matter jurisdiction over state suits like this and the All Writs Act lacks any removal authority. In addition, the Anti-Injunction Act itself suggests that injunctions are congressionally preferred to an expanded removal authority. In amending the Anti-Injunction Act into its present form, Congress assessed the interests at stake and the argument for preserving a federal forum for preclusion defenses. See *Toucey*, 314 U.S., at 132, 141 (pre-amendment decision refusing to acknowledge a relitigation exception absent statutory authorization). Congress well could have altered the removal statutes too, or made federal jurisdiction over these defenses exclusive, but it did not. Moreover, removal is the greater intrusion into state judicial proceedings, especially if a mere notice of removal ousts the state court of authority to proceed, or if the state plaintiff's case ends up only partly precluded. Removal deprives state courts of all authority over a case, while anti-suit injunctions are ordinarily issued to litigants and can (indeed must) be targeted to prevent relitigation of only those issues previously adjudicated. See *Chick Kam Choo*, 486 U.S., at 148. So far as we can tell, petitioners envision wholesale removal of entire state cases while a federal district court considers whether all or any of the state case is precluded.

Petitioners' *amicus* directs attention to federal settlement agreements that contain so-called "back-end opt-outs" as an example where removal would create less federal-state friction than anti-suit injunctions. Brief for PLAC 25–29. Even assuming that such restrictions on class members are valid, they do not justify removal. First of all, the friction-*free* alternative is to permit state proceedings to progress unhindered by either removal *or* injunction. Federal courts are at liberty to withhold All Writs relief, particularly if a state forum exists to adjudicate preclusion defenses. Second, the hypothetical situation presented involves state claims that are only partly precluded by a federal settlement; some of the claims will go forward. In what sense is it more intrusive to order an amendment of claims than to assert exclusive jurisdiction over an entire state case (one that lacks an independent basis of federal subject matter jurisdiction) only to remand the remainder of the case? Shuttling cases back and forth is no boon to federalism either.[8] Furthermore, insofar as PLAC's hypothetical involves injuries and claims that arise long after a federal settlement, the rationale for federal adjudication is undercut. Long lags between judgment and dispute make it less clear that a federal court is the better arbiter of aging documents.

Indeed an assurance that a federal court will arbitrate all disputes over the meaning of its decrees risks excessive tolerance for vagueness in drafting those decrees. Particularly when the rights of future victims are at stake, federal settlements must be absolutely plain to any reader. Taking care up front will better enable state courts to easily and fairly adjudicate preclusion defenses. Moreover, absent

[8] It is possible that PLAC believes state cases should remain in federal court even after they are determined to be partly preserved. But that would be extraordinary. At that point, the rationale and necessity for federal jurisdiction would have vanished even under PLAC's position. Federal courts would be adjudicating *un*precluded state law claims, while wholly lacking original jurisdiction.

and unnamed class members have a right to collaterally challenge a purported judicial resolution of their claims. See Monaghan, *supra*, at 1149–1150, and n. 4, 1185–1187, 1197; see also *Ortiz*, 527 U.S., at 846–848. An opportunity for non-participants to collaterally challenge in Court B the fundamental fairness of Court A's proceedings is a useful check on judicial authority and on any urge to sacrifice individual rights while clearing dockets. PLAC's proposal would effectively eliminate this check on federal class actions.[9]

[9] In the class-action context, some lower federal courts have become willing to issue injunctions against state suits before judgment and to promote the chances of reaching a global federal settlement. See PLAC Br. 24, n. 7. But see *In re Federal Skywalk Cases*, 680 F.2d 1175, 1182–1183 (CA8), *cert. denied*, 459 U.S. 988 (1982); *In re Glenn W. Turner Enterprises Litig.*, 521 F.2d 775, 780 (CA3 1975). These pre-judgment injunctions are a matter of intense controversy within the practicing bar. In TLPJ's view, they conflict with the narrow, traditional understanding of what is "necessary in aid of [a district court's] jurisdiction." 28 U.S.C. §2283; see *Atlantic Coast Line*, 398 U.S., at 295–296 (citing *Kline*); *Kline*, 260 U.S., at 229–230 (distinguishing *in personum* from *in rem* jurisdiction); see also *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 641–643 (1977) (plurality opinion of Rehnquist, J.); *County of Imperial* v. *Munoz*, 449 U.S. 54, 60, n. 4 (1980). These injunctions have little to do with the federal judiciary's ability to adjudicate the cases properly before them, but they seriously interfere with state courts' ability to do the same. But far more importantly, the necessary-in-aid-of-jurisdiction exception to the Anti-Injunction Act is not before the Court, and we ask that the excursions of the lower courts receive no endorsement whatsoever in the Court's decision.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ARTHUR H. BRYANT
TRIAL LAWYERS FOR PUBLIC JUSTICE
One Kaiser Plaza
Suite 275
Oakland, CA 94612
Telephone: (510) 622-8150

MICHAEL J. QUIRK
TRIAL LAWYERS FOR PUBLIC JUSTICE
1717 Massachusetts Ave. NW
Suite 800
Washington, DC 20036
Telephone: (202) 797-8600

ADAM SAMAHA
Counsel of Record
ROBERTA B. WALBURN
MARTHA K. WIVELL
ROBINS, KAPLAN, MILLER & CIRESI, L.L.P.
2800 LaSalle Plaza
800 LaSalle Ave.
Minneapolis, MN 55402-2015
Telephone: (612) 349-8500

Attorneys for Amicus Curiae

Supreme Court, U.S.
FILED
JUN 4 2002
CLERK

No. 01-757

IN THE

Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC., ROBERT BABB, EDEE TEMPLET, AND KENNETH A. DEVUN,
Petitioners,

v.

HURLEY HENSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JOHN CORNYN
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-2191

LONNY S. HOFFMAN *
UNIV. OF HOUSTON LAW CENTER
Teaching Unit II, Room 128
Houston, Texas 77204-6060
(713) 743-5206

GREGORY S. COLEMAN
WEIL GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy
Suite 4140
Austin, Texas 78759
(512) 349-1937

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

39 pages

QUESTION PRESENTED

Does the All Writs Act, 28 U.S.C. § 1651(a), authorize the removal of civil actions to federal district court?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE PLAIN, UNAMBIGUOUS LANGUAGE OF THE ALL WRITS ACT DOES NOT VEST DISTRICT COURTS WITH AUTHORITY TO EXERCISE JURISDICTION OVER A CASE REMOVED UNDER § 1651(A).	5
A. The Language of the All Writs Act is Plain and Unambiguous and Does Not Confer Original Jurisdiction on the Federal Courts.	5
B. Further Proof of the All Writs Act's Plain Meaning Is Evident in the Absence of Specific Details, Procedures and Limits for Removal in § 1651(a).	7
II. LEGISLATIVE AND JUDICIAL HISTORY CONFIRM THAT THE ALL WRITS ACT DOES NOT AUTHORIZE REMOVAL.	9
A. Statutory Antecedents of § 1651(a).	10
B. Interpreting Legislative Intent.	11
III. REMOVAL UNDER THE ALL WRITS ACT IS NOT AUTHORIZED SO LONG AS OTHER REMEDIES EXIST FOR AIDING FEDERAL JURISDICTION AND PROTECTING FEDERAL JUDGMENTS.	15

TABLE OF CONTENTS—Continued

	Page
A. Writs Under § 1651(a) May Not Issue When Adequate Alternative Remedies Exist.	15
B. Preclusion Defenses and Injunctive Relief Adequately Aid Federal Jurisdiction and Protect and Effectuate Federal Judgments.	17
1. Adequacy of Preclusion Defenses to Protect and Effectuate Federal Judgments.	17
2. Injunctive Relief Adequately Aids Federal Jurisdiction and Protects and Effectuates Federal Judgments.	19
IV. THE EXERCISE OF ANCILLARY JURISDICTION WILL NOT VALIDATE REMOVAL UNDER THE ALL WRITS ACT.	22
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980)	16
Atlantic Coast Line R. Co. v. Locomotive Engineers, 398 U.S. 281 (1970)	19, 21, 28
Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986)	26
Carlisle v. United States, 517 U.S. 416 (1996)	16
Caterpillar Inc. v. Williams, 482 U.S. 386 (1987)	6, 25
Clinton v. Goldsmith, 526 U.S. 529 (1999)	5, 16
Connecticut National Bank v. Germain, 503 U.S. 249 (1992)	9
Covington & Cincinnati Bridge Co. v. Hager, 203 U.S. 109 (1906)	6
Henson v. Ciba-Geigy Corp., 261 F.3d 1065 (CA11 2001)	4
Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	18
Kokkonen v. Guardian Life Insurance Co., 511 U.S. 375 (1994)	23, 26-27
Oklahoma Tax Comm'n v. Graham, 489 U.S. 838 (1989)	6, 7, 25
Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986)	21
Peacock v. Thomas, 516 U.S. 349 (1996)	23, 24
Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34 (1985)	6, 11, 16, 20
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)	27
Richards v. Jefferson County, 517 U.S. 793 (1996)	27
Rivet v. Regions Bank, 522 U.S. 470 (1998)	3, 7, 18-19, 21, 25

TABLE OF AUTHORITIES—Continued

	Page
Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943)	16
Sable v. General Motors Corp., 90 F.3d 171 (CA6 1996)	28
Texas v. Real Parties in Interest, 259 F.3d 387 (CA5 2001)	1
United States Alkali Export Ass'n v. United States, 325 U.S. 196 (1945)	11
Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977)	29
Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (CA2 1988), *cert. denied*, 489 U.S. 1077 (1989)	28
Younger v. Harris, 401 U.S. 37 (1971)	20
STATUTES	
Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80	13
Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81	10
Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (1789)	3, 10
Act of March 3, 1911, ch. 231, 36 Stat. 1156, 1162	10
9 U.S.C. § 205	8
12 U.S.C. § 1819(b)(2)(B)	8
28 U.S.C. § 1330	5
28 U.S.C. § 1331	5
28 U.S.C. § 1332	5
28 U.S.C. § 1333	5
28 U.S.C. § 1335	5
28 U.S.C. § 1337(a)	5
28 U.S.C. § 1338(a)	5

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 1339	5
28 U.S.C. § 1340	5
28 U.S.C. § 1343	5
28 U.S.C. § 1344	5
28 U.S.C. § 1345	5
28 U.S.C. § 1346(a)	5
28 U.S.C. § 1347	5
28 U.S.C. § 1348	5
28 U.S.C. § 1350	5
28 U.S.C. § 1351	5
28 U.S.C. § 1352	5
28 U.S.C. § 1353	5
28 U.S.C. § 1354	5
28 U.S.C. § 1355	5
28 U.S.C. § 1356	5
28 U.S.C. § 1357	5
28 U.S.C. § 1361	5
28 U.S.C. § 1362	5
28 U.S.C. § 1363	5
28 U.S.C. § 1365	5
28 U.S.C. § 1368	5
28 U.S.C. § 1441	2
28 U.S.C. § 1442	7
28 U.S.C. § 1442a	7
28 U.S.C. § 1443	7
28 U.S.C. § 1446-50	3, 8
28 U.S.C. § 1651(a)	*passim*
28 U.S.C. § 2283	4, 19, 28
33 U.S.C. § 466g-1	5
Class Action Fairness Act, H.R. 2341, 107th Cong. (2001); S. 1712, 107th Cong. (2001)	25, 26

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page
4 The Documentary History of the Supreme Court of the United States, 1789-1800, Organizing the Federal Judiciary: Legislation and Commentaries (Maeva Marcus *et al.* eds., 1992)	12, 14
Amar, Marbury, Section 13 and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443 (1989)	13
Fallon *et al.*, Hart and Wechsler's The Federal Courts and the Federal System (4th ed. 1996)	8, 11
Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 Colum. L. Rev. 1148 (1998)	27
Pfander, Marbury, Original Jurisdiction and the Supreme Court's Supervisory Powers, 101 Colum. L. Rev. 1515 (2001)	13
Redish, Abstention, Separation of Powers, and the Judicial Function, 94 Yale L. J. 71 (1985)	26
Steinman, The Newest Frontier of Judicial Activism: Removal Under the All Writs Act, 80 B.U. L. Rev. 773, 794-814 (2000)	28
Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923)	14
Wechsler, The Political Safeguards of Federalism: The Role of the States in The Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954)	28
13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3503 (2d ed. 1996)	8

IN THE

Supreme Court of the United States

No. 01-757

SYNGENTA CROP PROTECTION, INC., ROBERT BABB, EDEE TEMPLET, AND KENNETH A. DEVUN,
Petitioners,

v.

HURLEY HENSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

Texas appears in support of Respondent, *see* SUP. CT. R. 37.4, urging the Court to affirm the judgment of the Eleventh Circuit and hold that the All Writs Act, 28 U.S.C. § 1651(a), does not authorize the removal of civil actions to federal district court. Texas has been involved in litigation in which the All Writs Act has been invoked repeatedly as a means of removing proceedings initiated by the state and in contravention of the state's Eleventh Amendment immunity. *See, e.g., Texas v. Real Parties in Interest*, 259 F.3d 387 (CA5 2001). While the Fifth Circuit has expressed considerable doubt about the propriety of a removal under the All

Writs Act, it has not yet been willing to reject categorically a federal court's power to exercise jurisdiction over a case removed solely on the basis of the All Writs Act. Texas has expended substantial time and resources litigating this issue and has a strong interest in having it fully resolved.

In some, but not all of the circuit and district court decisions approving removal under the All Writs Act, the asserted basis for removal has been the existence of a prior federal judgment said to be preclusive of a subsequent state court action. The present case raises the All Writs Act removal question in this preclusion context. Other courts have upheld removal under § 1651(a) on the assertion that a subsequent state case threatened to interfere with a federal court's jurisdiction before judgment in separate, on-going proceedings. Although this case raises the All Writs Act removal question in the preclusion context, the question on which this Court granted *certiorari* touches both contexts and thereby implicates Texas's broader interests. Texas believes it is appropriate for the Court to declare, consistent with the text, structure, and history of the All Writs Act, that under no circumstances may the All Writs Act be invoked to remove civil actions to federal district court.

SUMMARY OF ARGUMENT

The All Writs Act may not be relied upon to remove civil actions to federal district court.

A. The plain and unambiguous language of 28 U.S.C. § 1651(a) does not confer original jurisdiction on the district courts. This is significant because in the general removal statute, 28 U.S.C. § 1441, Congress has authorized removal only of civil actions of which the federal court would have had "original jurisdiction" had suit been commenced in the federal forum. The Court has insisted on strict adherence to the § 1441 original jurisdiction requirement and recently reiterated that although Congress possesses the power to

authorize removal without an accompanying grant of original jurisdiction to the federal courts, it must do so expressly. *Rivet v. Regions Bank*, 522 U.S. 470, 474 (1998).

Further proof that the statute plainly and unambiguously does not vest district courts with authority to exercise jurisdiction over a case removed under the All Writs Act may be found by comparing § 1651(a) to other statutes that expressly authorize removal. Not only has Congress specifically granted a right of removal in a number of statutory provisions, but on every occasion it has done so, Congress has either included particular procedures to govern removal in the specific statute itself or incorporated by reference the general procedural rules on removal contained in 28 U.S.C. §§ 1446-50. By comparison, the All Writs Act contains no reference to removal, let alone any specific procedural guidelines that would apply to a removal effected under § 1651(a). Congress did not intend to vest district courts with authority to exercise jurisdiction over cases removed under §1651(a). The Court should not read into the statute what Congress has declined to write into it.

B. Two centuries of history of the All Writs Act demonstrates that the drafters of the original "all other Writs" clause of § 14 of the Judiciary Act of 1789 did not intend the statutory provision to vest the lower federal courts with original jurisdiction or to be used to authorize the removal of civil actions. The drafters' purpose in enacting § 14 solely was to grant power to enforce the limited jurisdiction the lower federal courts were accorded in other statutory provisions of the Act. Neither the First Congress nor any since have intended the All Writs Act to carry additional, unstated and expansive powers to authorize removal beyond those removal rights narrowly enumerated in other statutory provisions.

C. Even if the plain and unambiguous language of the statute and its legislative history are ignored, removal under

the All Writs Act is not authorized because the exercise of writ power is neither "necessary" nor "appropriate." In a long line of cases, the Court has insisted that where adequate, alternative remedies exist, resort may not be made to the All Writs Act to fashion "ad hoc" relief. Long before the Second Circuit first read additional removal authority into the All Writs Act, federal judgments were protected adequately by state courts applying preclusion law to determine the preclusive effect of prior federal judgments. A district court's jurisdiction both before and after judgment may also be protected through the issuance of injunctive relief by the federal court. Because preclusion law and injunctive relief are adequate alternatives to removal, § 1651(a) may not be invoked to remove a civil action to federal court.

D. The exercise of ancillary jurisdiction will not validate removal under the All Writs Act of a civil action lacking an independent basis of federal subject matter jurisdiction. The right of removal is entirely a matter of legislative prerogative, and it is one that Congress has narrowly accorded since 1789. Drawing on a federal court's ancillary jurisdiction to justify removal under the All Writs Act invites judicial usurpation of the legislature's authority to define the scope of the privilege of removal. Additionally, Congress has set forth in the Anti-Injunction Act, 28 U.S.C. § 2283, three narrow and limited exceptions to the general rule of non-interference in state judicial proceedings. To read the All Writs Act as an independent source of removal authority substitutes the stringent standards in the Anti-Injunction Act for an inchoate, ill-defined measure of "extraordinary circumstances" that pays no heed to the strict limits of § 2283. As the Eleventh Circuit observed in its opinion in the present case, permitting removal based exclusively on the All Writs Act "perverts" § 1651(a) "from a tool for effectuating Congress's intent into a device for judicially reequalibrating a state-federal balance that is Congress's to strike." *Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1071 (CA11 2001).

ARGUMENT

I. THE PLAIN, UNAMBIGUOUS LANGUAGE OF THE ALL WRITS ACT DOES NOT VEST DISTRICT COURTS WITH AUTHORITY TO EXERCISE JURISDICTION OVER A CASE REMOVED UNDER § 1651(a).

A. The Language of the All Writs Act is Plain and Unambiguous and Does Not Confer Original Jurisdiction on the District Courts.

The plain and unambiguous language of § 1651(a) does not confer original jurisdiction on the federal district courts. In the All Writs Act, the Supreme Court and lower federal courts are given authority to issue writs "in aid of their respective jurisdictions." This contrasts sharply with the language of numerous other statutory provisions in Title 28 in which Congress specifically has conferred "original jurisdiction" on the federal courts.[1] The plain and unambiguous language of the All Writs Act demonstrates, then, that Congress did not confer original subject matter jurisdiction on the federal district courts in the Act.

That the language of the All Writs Act plainly and unambiguously does not confer original jurisdiction long has been accepted by this Court. *See, e.g., Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999)(observing that "[w]hile the All Writs Act authorizes employment of extraordinary writs, . . . the express terms of the Act confine the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction;

---

[1] *See* 28 U.S.C. §§ 1330, 1331, 1332, 1333, 1335, 1337(a), 1338(a), 1339, 1340, 1343, 1344, 1345, 1346(a), 1347, 1348, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1361, 1362, 1363, 1365 and 1368. In addition to these grants of "original jurisdiction" in Title 28, Congress has also provided the federal district courts with "original jurisdiction" under other titles of the United States Code. *See, e.g.*, 33 U.S.C. § 466g-1.

the Act does not enlarge that jurisdiction"); *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 41 (1985)(remarking that §1651(a) may be used only for "filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction"); *Covington & Cincinnati Bridge Co. v. Hager*, 203 U.S. 109, 110 (1906)(observing that "[i]t has been too frequently decided in this court to require the citation of cases that the circuit courts of the United States have no jurisdiction in original cases of mandamus, and have only power to issue such writs in aid of their jurisdiction in cases already pending, wherein jurisdiction has been acquired by other means and by other process").

Congressional failure to provide for "original jurisdiction" in the All Writs Act is significant. In the general removal provision, 28 U.S.C. § 1441, Congress has authorized removal only of civil actions of which the federal court would have had "original jurisdiction" had suit been initiated there. This Court has insisted on close adherence to the requirements of § 1441. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant."); *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 840 (1989)(citing 28 U.S.C. § 1441(a) for the general proposition that "'[e]xcept as otherwise expressly provided by Act of Congress, a case is not properly removed to federal court unless it might have been brought there originally"). Because the unambiguous language of the All Writs Act does not confer original jurisdiction on the federal courts, predicating removal on the All Writs Act impermissibly expands the subject matter jurisdiction of the federal district courts beyond the maximum limits authorized by Congress.

While it is true that Congress, in its discretion, may authorize removal jurisdiction without conferring original

jurisdiction on the district courts, there is no indication that Congress intended to do so in the All Writs Act. In the few instances in which Congress has authorized removal of a case without directly conferring original jurisdiction, it has done so by conferring the privilege of removal specifically and expressly in the statutory language. *See, e.g.*, 28 U.S.C. §1442 (allowing removal of civil or criminal suits and without regard to whether the claims arise under federal law within the meaning of 28 U.S.C. § 1331 or the diversity requirements of 28 U.S.C. § 1332 have been satisfied); 28 U.S.C. § 1442a (same); 28 U.S.C. § 1443 (allowing removal of an action seeking to enforce a right under any law providing for equal civil rights); *see also Oklahoma Tax Comm'n*, 489 U.S., at 841 (holding state tax case against Indian tribe was improperly removed where district court lacked original jurisdiction over the case and observing that "[t]he jurisdictional question in this case is not affected by the fact that tribal immunity is governed by federal law. . . . Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities."). By contrast, § 1651(a) contains no mention of any removal authority and the Court has emphasized that, although Congress possesses the power to authorize removal without an accompanying grant of original jurisdiction, it must do so expressly. *Rivet v. Regions Bank*, 522 U.S. 470, 474 (1998).

B. Further Proof of the All Writs Act's Plain Meaning Is Evident in the Absence of Specific Details, Procedures and Limits for Removal in § 1651(a).

In every instance in which Congress has granted removal authority it has provided specific criteria to address by whom, of what, to where, and how removal will be permitted, either in the specific statute itself, or by making applicable the general procedural rules on removal contained in 28 U.S.C.

§§ 1446-50. Thus, in 9 U.S.C. §205, Congress promulgated specific removal authority for matters relating to an arbitration agreement or award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards but prescribed that the general procedures for removal in §§ 1446-50 be used. *See* 9 U.S.C. § 205 ("The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal."). In other statutory enactments in which removal has been authorized, Congress has chosen to promulgate specific removal procedures to be followed, rather than cross-reference the general procedures in §§ 1446-50. *See, e.g.*, 12 U.S.C. § 1819(b)(2)(B).

By comparison, the All Writs Act contains neither reference to particular removal procedures nor cross-reference to the general removal procedures in §§ 1446-50. That absence is significant because the privilege of removal is entirely a matter of legislative prerogative. No provision in the Constitution allows removal of cases from state to federal court. While a right of removal has been authorized continuously from the Judiciary Act of 1789 to the present day, Congress has never conferred removal authority to the full extent permissible under Article III, just as it has never conferred on the federal courts all of the original jurisdiction Article III would allow.[2] Consequently, it would be inconsistent with a

[2] *See generally* Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 32 (4th ed. 1996) [hereinafter Hart & Wechsler]("When the respective jurisdictions of the district and circuit courts and the Supreme Court are viewed together, the 1789 Act fell short of vesting the federal courts in "all Cases" in which Article III would have permitted jurisdiction based primarily on subject matter); 13 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3503, at 9 (2d ed. 1996)(observing that "at no time in history has the entire judicial power been vested in the federal courts").

plain and unambiguous reading of the All Writs Act to maintain that Congress intended to vest district courts with authority to exercise jurisdiction over a case removed under § 1651(a) when it set specific limitations on the privilege of removal in all other enabling legislation. Congress plainly has not conferred removal authority in the All Writs Act or legislated specific procedures for removal under the statute, and the Court should not read into the statute what Congress has declined to write into it.

The plain and unambiguous text of the All Writs Act demonstrates no intent by Congress to confer original jurisdiction on the district courts or to otherwise sanction removal under § 1651(a). Where the statutory language is unambiguous and the "statutory scheme is coherent and consistent," no further inquiry is warranted. *See Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'")(internal citations omitted).

II. LEGISLATIVE AND JUDICIAL HISTORY CONFIRM THAT THE ALL WRITS ACT DOES NOT AUTHORIZE REMOVAL.

The historical record of congressional intent in enacting the original "all other Writs" provision of the Judiciary Act of 1789 demonstrates the First Congress did not intend it to serve as an independent source of jurisdiction for the lower federal courts or to be used to authorize the removal of civil actions. This evidence of legislative intent is itself further supported by the widely accepted historical account of the context in which the First Judiciary Act was enacted. Section 14 was promulgated by a legislature torn by

conflicting attitudes toward the lower federal courts being created. The compromises reflected in the Act, which are reflective of the battles waged between the broad and narrow pro-Constitution forces, cannot be squared with the belief that a majority of legislators ceded unbridled and additional removal authority on the lower federal courts in § 14 to hear cases otherwise not within the limited jurisdiction accorded to them.

A. Statutory Antecedents of § 1651(a).

The All Writs Act had its beginning in §§ 13 and 14 of the Judiciary Act of 1789. *See* Judiciary Act of 1789, ch. 20, §§ 13 and 14, 1 Stat. 73, 81-2.[3] When Congress enacted the 1948 codification of the Judicial Code, it consolidated §§ 342, 376, and 377 of the Judicial Code of 1940 into 28 U.S.C. § 1651(a). Sections 342, 376 and 377 of the 1940 Code, in turn, had been derived from §§ 234, 261, and 262 of the Judicial Code of 1911. *See* Act of March 3, 1911, ch. 231, 36 Stat. 1156, 1162. Prior to 1911, §§ 13 and 14 of the 1789 Act were the sole sources of power for the Supreme Court and lower federal courts to issue extraordinary writs. The statutory language of §1651(a) promulgated in the 1948 codification remains unchanged. *See* 28 U.S.C. § 1651(a) (1994) (amending 28 U.S.C. § 1651(a) (1948)).

The 1948 codification of § 1651(a) deleted the phrase "not specially provided for by statute," originally found in § 14 of the First Judiciary Act. The legislative history indicates, however, that the recodification made only "necessary

[3] Section 13 authorized the Supreme Court to issue writs of prohibition to the district courts "when proceeding as Courts of admiralty and maritime jurisdiction; and writs of mandamus in cases warranted by the principles and usages of law, to any Courts appointed, or persons holding office, under the authority of the United States." *See* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81.

changes in phraseology" and not substantive modifications to the prior statutory sections. *See* 28 U.S.C. §1651(a) (1994) (reviser's note). Section 1651(a) continued to be limited by the pre-existing statutory requirement that writs may issue only after a federal court's jurisdiction otherwise has been established. *See id.* The legislative history of §1651(a) also reveals that the new section was intended to codify the holding of the Supreme Court in *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945). *See* 28 U.S.C. § 1651(a) (1994) (reviser's note). In *Alkali*, the Court reversed the district court's use of the All Writs Act power, observing that the "writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible." *Alkali*, 325 U.S., at 203.[4]

As a result of the revisions made by Congress to the Judicial Code in 1948, the All Writs Act is now the only statutory authority on which the issuance of extraordinary writs (excluding writs of habeas corpus) may be based. *See* Hart & Wechsler, at 343 (noting that "the only statutory authority for the issuance of the extraordinary writs . . . is . . . the famous all-writs section—now 28 U.S.C. §1651(a)").

B. Interpreting Legislative Intent.

Although there is "scant" historical evidence of legislative intent regarding §§ 13 and 14 of the Judiciary Act of 1789, *see Pennsylvania Bureau of Correction*, 474 U.S., at 41, it is still possible to determine legislative intent (i) by considering the structure of the statutory language and (ii) by comparing

[4] This latter portion of § 1651(a)'s legislative history is especially relevant to the argument that, where adequate, alternative remedies exist, resort to the All Writs Act is unwarranted. *See infra* Part III.

this evidence with what is known about the period generally in terms of legislative attitudes in the First Congress toward the lower federal courts that were being created in the 1789 Act. Together, this evidence demonstrates that in promulgating § 14 the First Congress did not intend to confer original jurisdiction on the lower federal courts beyond the limited jurisdiction given in other provisions of the Act.

Section 14, drafted by Oliver Ellsworth,[5] was not discussed at any length in the debates in the First Congress regarding enactment of the Judiciary Act of 1789. Only one change to §14 was recorded.[6] The final version, as reflected in the Act's enrolled version, provided in relevant part:

> [A]ll the before mentioned Courts of the United States shall have power to issue writs of Scire facias, habeas Corpus, and all other Writs not specially provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.[7]

The language of § 14 is strongly suggestive that the First Congress did not intend the statutory provision to serve as an independent source of original jurisdiction for the lower

[5] *See* 4 The Documentary History of the Supreme Court of the United States, 1789-1800, Organizing the Federal Judiciary: Legislation and Commentaries, at 36 (Maeva Marcus et al. eds., 1992)[hereinafter DHSC] (noting that "sections 10-24 [of the original Senate bill of the Judiciary Act] are in Oliver Ellsworth's hand").

[6] In DHSC, Professor Marcus remarks that the words "subpoena & protection for witnesses" were probably excised from the original manuscript senate bill, first read in the Senate on June 12, 1789, by the senate judiciary committee and did not appear in the printed Senate bill, which was produced between June 12 and June 16, 1789. *See* 4 DHSC, at 36, 71.

[7] *See* 4 DHSC, at 71.

federal courts.[8] Section 14 distinguishes between the writs that are listed by name in the 1789 Act—scire facias and habeas corpus in § 14 and mandamus and prohibition in § 13—and "all other Writs not specially provided for by Statute." Section 14 authorizes issuance of the former, named writs without qualification; but under the "all other Writs" clause the federal courts could not issue one of the unnamed writs unless it was shown that issuance was "necessary for the exercise of their respective jurisdictions." Constructed in this fashion, the language of § 14 makes only the latter, unnamed writs expressly subject to the limitation of prior jurisdiction having been established.

The grant of general removal jurisdiction in the Judiciary Act of 1789 further supports this understanding of § 14's "all other Writs" provision. In §12 of the First Judiciary Act, when the amount in controversy was $500 or more, Congress expressly authorized removal to federal circuit court for alien defendants; for defendants in diversity cases in which the plaintiff was a citizen of the state in which suit was brought; and for either party in cases involving title disputes when the parties were relying on grants from different states. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. No mention was made in § 12 of any additional writ power of removal, and § 14 contained no such reference. The limited circumstances

[8] Academic commentators concur that §14 was not intended to confer original jurisdiction on the lower federal courts. *See, e.g.*, James E. Pfander, Marbury, Original Jurisdiction and the Supreme Court's Supervisory Powers, 101 Colum. L. Rev. 1515, 1547, 1587-88 (2001) (concluding that § 14 gave the lower federal courts only "ancillary or auxiliary power" to issue writs in aid of their jurisdiction otherwise established); Akhil R. Amar, Marbury, Section 13 and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 458 (1989) (noting that § 14 invested "courts with certain authority if and when they have independently founded jurisdiction. . . . . 'Jurisdiction' must be established first, and independently; 'power' then follows derivatively.").

in which removal of a state case was allowed by § 12 cannot be squared with the notion that the drafters—without explicitly saying so—also enacted a general, residual grant of removal jurisdiction in § 14.

That the original "all other Writs"provision of § 14 did not vest the lower federal courts with additional jurisdictional authority is consistent with the widely accepted historical account of legislative attitudes generally during the period toward the federal judiciary. At the time §§ 13 and 14 were debated, there was considerable opposition already within the First Congress to the mere creation of inferior federal courts. Charles Warren described "the crucial contest in the enactment of the Judiciary Act" as between the broad pro-Constitution forces who urged that the legislative branch must give full Article III powers to the federal courts, once created, and their narrow pro-Constitution opponents who advocated forcefully for a limited grant of jurisdiction.[9]

Viewed against this historical backdrop, it is not plausible to maintain that a majority of this Congress intended to cede unbridled and additional powers to the lower federal courts in § 14 beyond those specifically enumerated. The compromises struck by the First Congress in the Judiciary Act of 1789 are illustrative of the powerful political battles being waged at the time by competing constituencies.[10] Section 14 was not intended to invest the inferior federal courts, if Congress chose to establish them, with broader jurisdiction than the limited jurisdiction they were given explicitly elsewhere in the Act.

In sum, neither the legislative history of § 14 nor the historical evidence of congressional attitudes toward the

---

[9] Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 65-70 (1923).

[10] *See generally* 4 DHSC, at 22-35.

newly established lower federal courts reveals any evidence of legislative intent to vest these courts with an expansive and unstated grant of additional jurisdiction in the residual "all other Writs" provision of § 14 or that the statutory section was meant to be used as an additional source of removal authority. The drafters' clear and plainly expressed purpose in enacting § 14 of the First Judiciary Act was to give the lower federal courts power to enforce the limited jurisdiction they were accorded in other statutory provisions. At the time, and indeed for another two centuries, the power to issue injunctive relief pursuant to the All Writs Act was understood to be entirely sufficient to protect and effectuate federal judgments. Only after 1988, when the Second Circuit first suggested that a more expansive removal authority was contained in the All Writs Act, did the lower courts begin to hold that the powers conferred by Congress in §1651(a) were more expansive than previously believed. Neither the Second Circuit's revisionist historical interpretation, nor the adoption of that interpretation by other courts, however, can be squared with the available historical evidence. The First Congress intended in § 14 only to confer on the lower federal courts power to issue writs under jurisdiction previously established.

III. REMOVAL UNDER THE ALL WRITS ACT IS NOT AUTHORIZED SO LONG AS OTHER REMEDIES EXIST FOR AIDING FEDERAL JURISDICTION AND PROTECTING FEDERAL JUDGMENTS.

A. Writs Under § 1651(a) May Not Issue When Adequate Alternative Remedies Exist.

It is so well-established as to be an axiom of the federal writ power under § 1651(a) that no writ may issue if an adequate remedy at law exists. As a result, even if the plain language of the statute and its legislative history are ignored, removal under the All Writs Act is not authorized so long

as other means exist for aiding federal jurisdiction and protecting and effectuating federal judgments.

The Court in *Pennsylvania Bureau of Correction* made clear the limits of § 1651. The All Writs Act

> is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate. 474 U.S., at 43.

In its most recent discussion of the All Writs Act, the Court again reaffirmed that § 1651(a) "invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Clinton v. Goldsmith*, 526 U.S. 529, 538 (1999).

The Court consistently has held that the availability of writ power is similarly circumscribed for all writs authorized by § 1651(a). *Carlisle v. United States*, 517 U.S. 416, 429 (1996) ("'The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute'") (quoting *Pennsylvania Bureau*, 474 U.S., at 43); *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (observing that "[i]n order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires"); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943) ("[w]here the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions").

B. Preclusion Defenses and Injunctive Relief Adequately Aid Federal Jurisdiction and Protect and Effectuate Federal Judgments.

Congress and the Court have outlined the relevant rules and doctrinal principles that guide the determination of whether and how a federal court's judgment may be protected and/or its jurisdiction before judgment aided. Although numerous authorities could be considered,[11] State *amicus* focuses on two of the most significant methods. The first—and, as this Court has noted, often preferred—method for protecting federal judgments is by *state* courts applying preclusion law to determine the preclusive effect of a prior federal judgment. The second method, though less commonly used, for protecting federal judgments is by *federal* courts issuing injunctive relief.

1. *Adequacy of Preclusion Defenses to Protect and Effectuate Federal Judgments.*

Courts that have relied on the All Writs Act to uphold a defendant's removal of an otherwise unremovable case have done so either because a prior federal judgment has been found to be preclusive of subsequently filed state claims or because a subsequently filed suit allegedly threatened to interfere with a prior federal judgment. The present case is an example of the former: the district court in the Southern District of Alabama upheld the removal of the state court

---

[11] A comprehensive, though probably not exhaustive, list would include the Federal Full Faith and Credit Statute (28 U.S.C. § 1738 (1994)); the *Rooker-Feldman* doctrine; traditional equitable principles; various abstention doctrines; the due process clauses of the Fifth and Fourteenth Amendments (*see, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979)); the Supremacy Clause (U.S. Const. art. VI, cl. 2); the non-binding but influential Restatement (Second) of Judgments, and general principles of federalism and comity (*see generally* Hart & Wechsler, at 1222-30)).

action filed in Iberville Parish, Louisiana after concluding that it was precluded by a settlement previously approved by the federal district court in related proceedings. J.A. 28a.

Arguably, the Court has indicated already that such preclusion-based removals are not proper. The Court recently ruled that where a prior federal judgment was said to be preclusive of a subsequent suit, the appropriate remedy was for the party seeking to enforce the federal decree to ask the state court to decide the preclusive effect of the prior judgment. *Rivet v. Regions Bank*, 522 U.S. 470 (1998). *Rivet* concerned a decision by a district court to retain jurisdiction over a case removed from Louisiana state court on the ground that the plaintiff's state cause of action was completely precluded by a federal bankruptcy court's prior judgment. The Fifth Circuit had approved the district court's denial of the plaintiff's motion to remand, construing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) as authorizing removal when a prior federal judgment was preclusive of a subsequently filed state case on a question of federal law.

The Court reversed the Fifth Circuit, clarifying that "*Moitie* did not create a preclusion exception to the rule, fundamental under currently governing legislation, that a defendant cannot remove on the basis of a federal defense." *Id.*, at 472. A defense of claim preclusion "is not part of a plaintiff's properly-pleaded statement of his or her claim." *Id.*, at 475. Although an action completely preempted by federal law may be removed under the "artful pleading" doctrine, the Court distinguished complete preemption from claim preclusion. "A case blocked by the claim preclusive effect of a prior federal judgment differs from the standard case governed by a completely preemptive federal statute in this critical respect: The prior federal judgment does not transform the plaintiff's state-law claims into federal claims but rather extinguishes

them altogether." *Id.*, at 476. Thus, "claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b)." *Id.*, at 478.

Following *Rivet*'s clarification of *Moitie*, if removal is foreclosed under the "*Moitie* claim preclusion exception," then it should be equally clear that the All Writs Act provides no more valid basis for removal when grounded on the preclusive effect of a prior federal judgment. If a subsequent state case is precluded by a prior federal judgment, then the proper course for the party seeking to enforce the federal judgment typically will be to bring a defensive plea of preclusion in the state court. To permit removal under the All Writs Act where the sole ground is that the state suit is precluded by a prior federal judgment would render meaningless the rationale of *Rivet*.

2. *Injunctive Relief Adequately Aids Federal Jurisdiction and Protects and Effectuates Federal Judgments.*

Removal under the All Writs Act may also be regarded as improper because, where authorized by existing law, injunctive relief is an adequate, available remedy to aid federal jurisdiction and/or to protect and effectuate federal judgments.

The availability of injunctive relief depends on application of the Anti-Injunction Act, 28 U.S.C. § 2283 (1994), and, additionally, on a determination that no other statutory or common law doctrinal principles proscribe interference with state proceedings. As regards § 2283, the Court has ruled that a federal court may not enjoin state proceedings unless one of the express statutory exceptions contained within the Anti-Injunction Act is satisfied, and further cautioned that the exceptions "should not be enlarged by loose statutory construction." *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 287 (1970).

That a court may find injunctive relief proscribed in any particular case (or, for that matter, that no preclusive effect flows from a prior federal judgment) is immaterial to the question of whether resort may be made to the All Writs Act to remove a case otherwise not removable under existing law. The unavailability of injunctive relief is reflective not of any gap in federal power, of course, but instead merely illustrates the statutory and doctrinal limits on federal injunctive power and preclusion law. It is precisely when a request for injunctive relief is found to contravene the Anti-Injunction Act (or it is found that a prior federal judgment lacks preclusive effect) that resort to the All Writs Act to justify removal is most obviously unwarranted. To hold otherwise is to construe § 1651(a) as authorizing the issuance of "ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction*, 474 U.S., at 43. Where no injunction is authorized and/or no preclusive effect is owed to a prior federal judgment, removal under the All Writs Act amounts to an end-run under § 2283 and federal preclusion law, which is precisely the rationale- buttressing the well-established rule against issuance of writs where alternative remedies at law exist.

Amicus for Petitioners erroneously asserts that the defendants in the present case had an equal choice between removal of the state suit and an injunction against its continued prosecution. First, the "equal choice" paradigm ignores that the Court has counseled repeatedly that—absent unusual circumstances—principles of "Our Federalism" and the dictates of § 2283 provide a strong presumption against interference with state judicial proceedings. *See Younger v. Harris*, 401 U.S. 37, 41, 46, 53-54 (1971)(stating that interference with state proceedings is appropriate only where irreparable injury is "both great and immediate," where the state law is "flagrantly and patently violative of express constitutional prohibitions," or where there is a showing of

"bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief"); *see also Atlantic Coast Line*, 398 U.S., at 287, 297 (observing that "[p]roceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court"). Consequently, unless it is demonstrated that the state court cannot or will not decide correctly the preclusive effect of a prior federal judgment, the preferred method for protecting and effectuating federal judgments usually will be through reliance on a state court to make the preclusion determination, with review of that decision ultimately by the state's highest court and this Court. *See Rivet*, 522 U.S., at 478; *see also Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986)("[c]hallenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court").

Even if the state courts could not be relied on to determine the preclusive effect of prior federal judgments—an assumption the Court has never been willing to make—the availability of injunctive relief or removal rights depends not on litigant preferences, but legislative prerogative. The choice is Congress's to make—and it has made its choice. Removal of a civil action is proper only when the federal district court would have had original jurisdiction over the suit had it been initiated there, pursuant to 28 U.S.C. § 1441 (or, if one of the other, more specific removal statutes allow removal even when § 1441 does not). Injunctive relief may issue only if one of the express exceptions to the Anti-Injunction Act is satisfied, *Atlantic Coast Line*, 398 U.S., at 287. Allowing removal of a civil action solely on the basis of the All Writs Act contravenes existing statutory restrictions on the jurisdiction of the lower federal courts, as well as the

existing statutory proscriptions against interference with state proceedings Congress has promulgated in the Anti-Injunction Act.[12]

IV. THE EXERCISE OF ANCILLARY JURISDICTION WILL NOT VALIDATE REMOVAL UNDER THE ALL WRITS ACT.

The "ancillary jurisdiction" argument advanced by petitioners, also referred to as the "jurisdictional caulk" argument by the Eleventh Circuit in its decision in this case, will not validate a removal based solely on the All Writs Act. According to petitioners, even if the All Writs Act does not provide an independent source of original jurisdiction to support the removal of a state case, a federal court's ancillary jurisdiction to protect and effectuate its judgments may permit removal based solely on the All Writs Act. However, the existence of ancillary jurisdiction will not support removal under the All Writs Act because the argument (i) ignores the predicate requirement that no writ may issue when alternative, adequate remedies at law exist; (ii) misinterprets this Court's precedents; and, if adopted, would (iii) invite judicial usurpation of the legislative prerogative to define the scope of the privilege of removal and (iv) interfere with the balance between federal-state relations on which Congress has statutorily insisted.

---

[12] Recognizing that it is Congress's prerogative to define the right of removal, along with the jurisdiction of the lower federal courts, makes readily apparent the error of characterizing removal as "nothing more than another form of writ authorized by 28 U.S.C. § 1651." *See* Brief of *amicus curiae* Product Liability Advisory Council, Inc. at 22. While it is unassailably true that removal requires both injunctive power to enjoin state proceedings after removal and *certiorari* power to bring up the record, the statutory limits on federal subject matter jurisdiction and the restrictions on interference in state proceedings embodied in § 2283 render any exact equation of removal with other writ powers inapposite.

The ancillary jurisdiction argument ignores the well established principle that no writ may issue unless its issuance has been demonstrated to be "necessary or appropriate" and where no other adequate remedy at law exists. *See supra* Part III(A). Invoking ancillary jurisdiction, petitioners observe that federal judgments should be protected, but that truism does little more than serve as a reminder that such protection is to be sought, when appropriate, under existing law. The courts are not free simply to invent new procedures when they perceive the traditional means as inadequate. Because state courts normally should be relied upon to determine the preclusive effect of prior federal judgments and, where authorized, a federal court may issue injunctive relief, ancillary jurisdiction will not validate an All Writs Act removal.

Second, petitioners and their *amicus curiae* are incorrect in suggesting that this Court's decisions in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994), and *Peacock v. Thomas*, 516 U.S. 349 (1996), demonstrate that the exercise of a federal court's ancillary jurisdiction is sufficient to support removal under the All Writs Act. In *Kokkonen*, the Court made clear that federal courts exercise ancillary jurisdiction either "to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent" or "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.*, at 379-80. The first occasion for ancillary jurisdiction was inapplicable in *Kokkonen*, just as it is in the present case, because the subsequent claims were brought in a separate action.

The latter basis for ancillary jurisdiction articulated by *Kokkonen*, ancillary enforcement jurisdiction, also will not support an All Writs Act removal. Ancillary enforcement jurisdiction may be sufficient to support the issuance of injunctive relief, in appropriate cases, but never removal

under the All Writs Act of an otherwise unremovable case. A fundamental fallacy in this ancillary jurisdiction argument is that it confuses a federal court's power to issue injunctive relief to aid its jurisdiction and protect its judgments with the separate and distinct power to exercise original jurisdiction over a removed state case.

In *Peacock*, the Court denied the attempted exercise of jurisdiction over a suit to establish independent liability against a third party. The decision recognized, in *dicta*, that federal courts have power to enforce their judgments, although in the particular context of that case the reference was specifically and only to a court's ancillary jurisdiction over supplemental proceedings to collect and enforce its prior judgments.[13] *Peacock*, however, never gave its imprimatur to removal of a case without an independent basis of subject matter jurisdiction. Indeed, such a reading of *Peacock* is contrary both to other language in the case [14] and, more significantly, to numerous decisions of the Court expressly disapproving of the removal of civil actions that lack an independent basis of subject matter jurisdiction. *See, e.g.*,

[13] *Peacock*, 516 U.S., at 356, 358 (observing that "[w]e have reserved the use of ancillary jurisdiction in subsequent proceedings for the exercise of a federal court's inherent power to enforce its judgments. . . . In defining that power, we have approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments—including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances" and that "[t]o protect and aid the collection of a federal judgment, the Federal Rules of Civil Procedure provide fast and effective mechanisms for execution").

[14] *See, e.g., id.*, at 355 ("The court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims. In a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction.")(citations omitted).

Rivet, 522 U.S., at 478; *Oklahoma Tax Comm'n*, 489 U.S., at 840; *Caterpillar*, 482 U.S., at 393. In *Rivet*, for instance, this Court's remand of the Louisiana state case demonstrates that even state court proceedings that appear to directly threaten a prior federal judgment may not be removed in the absence of an independent basis of subject matter jurisdiction. *Rivet*, 522 U.S., at 478. Although the jurisdiction a federal court possesses that is ancillary to its original jurisdiction in a case may be sufficient to support the issuance of an injunction, ancillary jurisdiction can never provide a basis for removal under the All Writs Act of an otherwise unremovable case.

Third, this reading of *Kokkonen* and *Peacock* to permit removal under the All Writs Act of civil actions lacking an independent basis of federal subject matter jurisdiction would amount to judicial trumping of the legislative prerogative to define the jurisdictional limits of the federal district courts. Petitioners' mistaken interpretation of *Kokkonen* and *Peacock* is made evident by considering the class action context referenced by *amicus* for petitioners. Under current law, a state class action lacking an independent basis of federal subject matter jurisdiction may not be removed, even if the subject matter of the suit relates to prior or parallel federal proceedings. Congress is considering, but has not passed, legislation that, *inter alia*, would allow removal of certain state class action suits unremovable under existing law. Class Action Fairness Act, H.R. 2341, 107th Cong. (2001); S. 1712, 107th Cong. (2001). To suggest, however, that a federal court's ancillary jurisdiction may be drawn upon to permit removal on any occasion in which a subsequent state suit is perceived to threaten a prior federal court judgment or its jurisdiction before judgment ignores that it is for Congress to

determine the jurisdiction of the federal district courts.[15] *See generally* Martin H. Redish, Abstention, Separation of Powers, and the Judicial Function, 94 Yale L. J. 71, 74 (1985) (observing that where Congress has enacted express statutes providing for federal jurisdiction, separation of powers would be offended if legislative limitations on federal jurisdiction are ignored). This loose interpretation of ancillary jurisdiction may be desirable to some, but it is decidedly not what Congress has authorized. As the Court repeatedly has made clear, federal courts are courts of limited jurisdiction. They may exercise only those powers conferred upon them by the Constitution and by statute. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Their powers are "not to be expanded by judicial decree." *Kokkonen*, 511 U.S., at 377. The presumption is against jurisdiction "and the

[15] Even if enacted, such legislation still would only produce a fractional enlargement of federal judicial power through its broadening of the original jurisdiction of the district courts, as compared with the virtually unfettered expansion of federal judicial power that adoption of petitioners' reading of ancillary jurisdiction entails. H.R. 2341 applies only to certain class action suits; by comparison, petitioners urge removal rights for all state court litigation. Additionally, the proposed legislation is limited expressly to interstate class actions (*see id.*, at § 1(A)(7)(b) and "Purpose and Summary"); by comparison, there is no comparable restraint on an All Writs Act removal. Finally, and perhaps most significantly, where the proposed legislation would expand federal original jurisdiction in specific and definable ways (to make cognizable before the federal courts certain state class action suits now lacking an independent basis of federal subject matter jurisdiction), allowing All Writs Act removal expands federal jurisdictional power almost without limit. Petitioners permit removal merely on the tenuous assertion that subsequent state proceedings threaten a federal court's continuing jurisdiction before judgment. Endorsement of such an inexact threshold to justify removal expands federal subject matter jurisdiction not only beyond existing law, but well beyond anything contemplated by the proposed class action legislation.

burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.*[16]

Finally, petitioners' position endorses judicial interference with the balance of federal-state relations Congress statutorily

[16] In addition to the problem of subject matter jurisdiction, petitioners' ancillary jurisdiction argument also ignores existing limitations on the exercise of personal jurisdiction by the federal district courts. It is settled that the failure of absent class members to opt out of (at least some) Rule 23(b)(3) actions is a *necessary* condition to bind one who otherwise lacks minimum contacts with the forum court that certified the class action (the "F1" court). *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). A failure to opt out, however, is not a *sufficient* condition for territorial jurisdiction if the minimum procedural due process requirements of *Shutts* are not satisfied. Where nonresident class members lack minimum contacts with the forum, their absolute right under existing law to collaterally attack F1's procedural due process determinations are protected by constitutional limits on personal jurisdiction. *See, e.g., Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)(observing that a person "'is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process'" (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)) and that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger" (quoting *Chase National Bank v. Norwalk*, 291 U.S. 431, 441 (1934)). Yet, by allowing removal of any state action said to interfere with a federal court's judgment or its jurisdiction, a standard presumably broad enough to include a nonresident class member's collateral attack in a distant forum, petitioners read into the All Writs Act nationwide territorial jurisdictional authority to bind all persons from challenging the F1 judgment, without regard to their lack of minimum contacts with the forum. Yet, as Professor Monaghan has shown, "the All Writs Act cannot properly be read to side-step standard tests governing in personam jurisdiction. . . .[None of the Court's prior precedents provide a basis] "for believing that the Act should be construed as a general 'emergency all purpose' nationwide long-arm statute used to relax the requirements of Rule 4(k)(1)(A) whenever a court deems that result desirable." Henry P. Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 Colum. L. Rev. 1148, 1190-91 (1998).

has struck. Congress primarily determines the proper allocation of power between the federal and state courts. *See generally* Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in The Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954). Congress has set forth in the Anti-Injunction Act, 28 U.S.C. § 2283, three narrow and limited exceptions to the general rule of non-interference in state judicial proceedings. If a federal injunction of state proceedings is sought, the applicant must first demonstrate that the requested relief is not barred by § 2283. Courts that have upheld removal pursuant to the All Writs Act, however, have purported to do so by relying instead only on a showing that "extraordinary circumstances" exist.[17] In this manner, the stringent standards limiting federal interventions into state proceedings that are embodied in the Anti-Injunction Act and that have been taken seriously by the Court for over two centuries are replaced with an ill-defined measure that pays no heed to the strict limits on non-interference set forth in § 2283. That removal of a civil action solely under the All Writs Act might withstand a motion to remand even as a request for injunctive relief properly would be denied under the Anti-Injunction Act is an anomalous result patently contrary to the accepted view that § 1651(a) should be read in harmony with and subject to § 2283.[18]

---

[17] *See, e.g., Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (CA2 1988), *cert. denied*, 489 U.S. 1077 (1989); *Sable v. General Motors Corp.*, 90 F.3d 171, 175 (CA6 1996); *see generally* Joan Steinman, The Newest Frontier of Judicial Activism: Removal Under the All Writs Act, 80 B.U. L. Rev. 773, 794-814 (2000)(discussing cases approving removal based solely on the All Writs Act).

[18] *See, e.g., Atlantic Coast Line*, 398 U.S., at 295 (finding close similarities between the "in aid of jurisdiction" clause of §1651 and the "to protect or effectuate judgments" exception in the Anti-Injunction Act).

In *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977), the Court reiterated its earlier holding that the initial presumption under § 2283 is that "'any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.'" *Id.*, at 630 (quoting *Atlantic Coast Line*, 398 U.S., at 297). Relaxing this strict standard, the Court cautioned, would result in "whittl[ing] away by judicial improvisation" the prohibitions against intervention in state proceedings. *Id.*, at 631 (quoting *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 514 (1955)).

Upholding removal of an otherwise unremovable case based solely on the All Writs Act further exacerbates the danger of "judicial improvisation" against which the Court in *Vendo* cautioned. Removal under these circumstances amounts to judicial usurpation of the legislative prerogative to define the scope of the privilege of removal and judicial interference with the balance between state and federal rights on which Congress in § 2283 has insisted.

CONCLUSION

Texas respectfully urges the Court to affirm the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-2191

LONNY S. HOFFMAN *
UNIV. OF HOUSTON LAW CENTER
Teaching Unit II, Room 128
Houston, Texas 77204-6060
(713) 743-5206

GREGORY S. COLEMAN
WEIL GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy
Suite 4140
Austin, Texas 78759
(512) 349-1937

* Counsel of Record

No. 01-757

JUN 5 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC., ROBERT RABB, EDDEE TEMPLET AND KENNETH A. DEVUN,

Petitioners,

v.

HURLEY HENSON,

Respondent.

On Writ Of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

LEO V. BOYLE
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President,
The Association of
Trial Lawyers of America

JEFFREY ROBERT WHITE*
1050 31st. St., N.W.
Washington, DC 20007
(202) 965-3500
** Counsel of Record*
Attorney for Amicus Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE ALL WRITS ACT DOES NOT PROVIDE FEDERAL COURTS AN INDEPENDENT BASIS TO REMOVE STATE COURT ACTIONS NOT OTHERWISE REMOVABLE UNDER THE RULES PROVIDED BY CONGRESS. 4

A. The Independence of State Courts Is Essential to Our System of Federalism, Protected by the Constitution, and Secured By Enforcing the Limits on the Jurisdiction of Federal Court. 4

B. This Court's Precedents Preclude the Use of the All Writs Act to Remove a State Court Action That Is Not Within the Removal Statute Based on the Defense of the Preclusive Effect of a Prior Federal Judgment. 6

C. The All Writs Act Provides No Support for Expanding Jurisdiction Beyond that Provided by Statute Based on the Preclusive Effect of a Prior Federal Judgment. 14

1. The All Writs Act Should Be Narrowly Construed Against Expanding Federal Court Jurisdiction. 14

2. Removal Under the All Writs Act Is Not "Necessary or Appropriate" Where the Preclusive Effect of a Prior Federal Judgment may be Asserted in State Court..... 16

3. Removal Under the All Writs Act to Enforce the Preclusive Effect of a Prior Federal Judgment Is Not Necessary "In Aid of [the Court's] Jurisdiction."..... 20

4 Removal Under the All Writs Act Was Not Necessary To Aid the Jurisdiction Of the Issuing Court. 21

II. NEITHER THE DOCTRINE OF ANCILLARY JURISDICTION NOR STATUTORY SUPPLEMENTAL JURISDICTION PROVIDES AN INDEPENDENT BASIS FOR REMOVAL OF STATE COURT ACTIONS 22

A. The Judicial Doctrine of Ancillary Jurisdiction Is Not Available in this Case..... 22

B The Supplemental Jurisdiction Statute Does Not Provide a Basis for Removal..... 25

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR EXPANDING THE SCOPE OF FEDERAL COURT JURISDICTION. 28

CONCLUSION..... 29

TABLE OF AUTHORITIES

CASES

Ahearn v. Charter Township, 100 F.3d 451 (6th Cir. 1996)..... 26

Alden v. Maine, 527 U.S. 706 (1999) 4

Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980)..16

Amalgamated Clothing Workers v. Richman Brothers Co., 348 U.S. 511 (1954)..... 18

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) ... 4

Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 5, 15, 17

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)6

Chance v. Sullivan, 993 F. Supp. 565 (S.D. Tex. 1998)9, 19

Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) 17

Clinton v. Goldsmith, 526 U.S. 529, 534 (1999) ..16, 20, 21

Erie R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938) 5, 6

Federal Maritime Comm'n v. South Carolina State Ports Auth., No. 01-46, 2002 WL 1050457 (May 28, 2002)4, 5

Finley v. United States, 490 U.S. 545 (1989)6, 11, 14 23, 25

First Alabama Bank v. Parsons Steel, Inc., 474 U.S. 518 (1986)..... 10

Frankenberg v. Superior Distribs., Inc., 961 F. Supp. 1560 (S.D. Ala. 1997) 26

Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985)..... 5

Gregory v. Ashcroft, 501 U.S. 452 (1991)..... 4, 5

Healy v. Ratta, 292 U.S. 263 (1934) 11

Hillman v. Webley, 115 F.3d 1461 (10th Cir. 1997) 21

Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., No. 01-408, 2002 WL 1155866 (June 3, 2002) 12

Holt v. Lockheed Support Sys., Inc., 835 F. Supp. 325 (W.D. La. 1993).....27

Howlett v. Rose, 496 U.S. 356 (1990).....6

In re Estate of Tabas, 879 F. Supp. 464 (E.D. Pa. 1995) .27

In re VMS Sec. Litig., 103 F.3d 1317 (7th Cir. 1996).....9

Ivy v. Diamond Shamrock Chems. Co., 996 F.2d 1425 (2d Cir. 1993) 9

Jones v. Hildebrant, 432 US 183 (1977) 28

Kokkonen v. Guardian Life Insurance. Co., 511 U.S. 375 (1994).....6, 14, 22, 25

Kokkonen v. Guardian Life Insurance. Co. of America, 1993 WL 164884 (9th Cir. 1993) 25

Mayor v. Cooper, 6 Wall. 247 (1868) 11

McClung v Silliman, 19 U.S. (6 Wheat) 598 (1821).....19

Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982) 18

New York v. United States, 505 U.S. 144, 161 (1992).....5

Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) 6

Parker v. Crete Carrier Corp., 914 F. Supp. 156 (E.D. Ky. 1996).....26

Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986).....17

Peacock v. Thomas, 516 U.S. 349 (1996) 22

Printz v. United States, 521 U.S. 898 (1997).....5

Rivet v. Regions Bank, 522 U.S. 470 (1998).....11, 12

Royal Ins. Co. of Am. v. Quinn-L Capital Corp., 3 F.3d 877 (5th Cir. 1993).....24

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) ..19

Sable v. General Motors Corp., 90 F.3d 171 (6th Cir. 1996)9

Sebring Homes Corp. v. T.R. Arnold & Assocs., Inc., 927 F. Supp. 1098 (N.D. Ind. 1995).....26

Tafflin v. Levitt, 493 U.S. 455 (1990) 21

Texas v. White, 74 U.S. (7 Wall.) 700 (1869).....4

United States v. New York Telephone Co., 434 U.S. 159 (1977).....9, 20

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977).....17

Xiong v. Minnesota, 195 F.3d 424 (8th Cir. 1999).....9

Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir.1988), *cert. denied*, 489 U.S. 1077 (1989).....8, 9

Zewe v. Law Firm of Adams & Reese, 852 F. Supp. 516 (E.D. La. 1993).....27

STATUTES

28 U.S.C. § 1332 31

28 U.S.C. § 1367 .....23, 24

28 U.S.C. § 1441 .....7, 30

All Writs Act, 28 U.S.C. § 1651(a) ..... passim

Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310(c), 104 Stat. 5089 24

OTHER AUTHORITIES

Amar, Akhil Reed, *Marbury, Section 13, And The Original Jurisdiction Of The Supreme Court*, U. Chi. L. Rev. 443 (1989) 15

Annot., "State Or Federal Law As Governing Applicability of Doctrine of Res Judicata Or Collateral Estoppel In Federal Court Actions," 19 A.L.R. Fed 709 (1974) 18

DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, ORGANIZING THE FEDERAL JUDICIARY: LEGISLATION AND COMMENTARIES (Maeva Marcus et al. eds., 1992) 15

H.R. Rep. No. 101-734, 101st Cong., 2d Sess. 29, reprinted in 1990 U.S.C.C.A.N. 6860 26

Pfander, James E., *Supplemental Jurisdiction And Section 1367: The Case For A Sympathetic Textualism*, 148 U. Pa. L. Rev. 109 (1999) 24

Hoffman, Lonny Sheinkopf, *Removal Jurisdiction and the All Writs Act*, 148 U. Pa. L. Rev. 401 (1999) 8, 9, 16

Wright, Charles A., Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1994) 23, 24, 27

No. 01-757

IN THE

Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC., ROBERT RABB, EDDEE TEMPLET AND KENNETH A. DEVUN,

Petitioners,

v.

HURLEY HENSON,

Respondent.

On Writ Of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as *amicus curiae* in this case. Letters from the parties granting consent to the filing of this *amicus curiae* brief have been filed with this Court.[1]

---

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members,

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions. For many of those individuals, actions in state court based on state law represent a primary source of legal redress. Respect for state courts and comity have long characterized federal-state relations in this area. In ATLA's view, undue expansion of federal court power to divest state courts of jurisdiction undermines these values, contravenes the intent of Congress, and deprives plaintiffs of their choice of a state court forum.

SUMMARY OF THE ARGUMENT

1. The defining issue in this case is not whether a federal court has the power to enforce its judgment, but whether it has the authority to strip a state court of the power to decide the preclusive effect of that judgment in a case that is otherwise unremovable to federal court.

The independence of state courts is essential to our system of federalism and protected by the Tenth Amendment. This Court safeguards that independence by strictly enforcing Congress's limits on federal court jurisdiction.

The recent trend among federal courts to find "residual authority" in the All Writs Act to remove cases that do not satisfy the removal statutes violates those limits. This Court's precedents make clear that a

---

or its counsel make a monetary contribution to the preparation or submission of this brief.

defense based on federal law cannot provide the basis of jurisdiction. Rather, federal courts are obliged to permit the state court to adjudicate the federal defense, with ultimate review by this Court. Comity and due respect for state courts requires a presumption that the state courts are competent to adjudicate the preclusive effect of a prior federal judgment.

The All Writs Act should be construed against expanding federal jurisdiction. Resort to the Act is not "necessary or appropriate" where adequate remedy is available in state court. Removal to assure defendant the benefits of the prior settlement does not aid the jurisdiction of the federal court.

2. Neither the doctrine of ancillary jurisdiction nor the Supplemental Jurisdiction Statute can support removal in this case. Petitioners failed to assert ancillary jurisdiction in the court below. Moreover, this case is governed by 28 U.S.C. § 1367, rather than the judicial doctrine of ancillary jurisdiction.

Petitioners fail to address the application of § 1367 to this case. Federal courts generally regard the Supplemental Jurisdiction Statute as not providing the original jurisdiction required by the removal statute. Additionally, removal on that basis would result in unnecessary interference with state courts.

3. The decision below should be affirmed. If, however, this Court is persuaded that federal courts should be given expanded authority to remove state court cases, this case is not a proper vehicle to do so. Petitioners have abandoned the grounds for reversal argued in the Petition and have failed to preserve their alternative grounds for reversal.

ARGUMENT

I. THE ALL WRITS ACT DOES NOT PROVIDE FEDERAL COURTS AN INDEPENDENT BASIS TO REMOVE STATE COURT ACTIONS NOT OTHERWISE REMOVABLE UNDER THE RULES PROVIDED BY CONGRESS.

A. The Independence of State Courts Is Essential to Our System of Federalism, Protected by the Constitution, and Secured By Enforcing the Limits on the Jurisdiction of Federal Court.

Ours is "an indestructible union, compos d of indestructible states," *Texas v. White*, 74 U.S. (7 all.) 700, 725 (1869). This dual sovereignty is a d ning feature of our Nation's constitutional bluepri .. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991) As the Court has recently reminded, "States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government." *Federal Maritime Comm'n* v. *South Carolina State Ports Auth.*, No. 01-46 (May 28, 2002), 2002 WL 1050457 at *5. "Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power." *Alden v. Maine*, 527 U.S. 706, 713-14 (1999).

Though "our system of dual sovereignty is not a model of administrative convenience . . . that is not its purpose. Rather, '[t]he constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties.'" *Federal Maritime Comm'n, supra* at *14, citing *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985) (quoting

Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting). "By guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty," this Court strives "to maintain the balance of power embodied in our Constitution and thus to 'reduce the risk of tyranny and abuse from either front.'" *Federal Maritime Comm'n* at *14, quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

This constitutional protection extends to the judicial authority of the states. As this Court has observed, among the powers not surrendered to the national government but reserved to the States is "the maintenance of state judicial systems for the decision of legal controversies." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285 (1970). It is fundamental that:

> [T]he constitution . . . recognizes and preserves the autonomy and independence of the States . . . in their judicial departments. Supervision over . . . the judicial action of the States is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference . . ., except as thus permitted, is an invasion of the authority of the State, and, to that extent, a denial of its independence.

Erie R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938).

Admittedly, state courts stand on somewhat different footing from the state legislative and executive branches, which may not be commandeered by the national government. *New York v. United States*, 505 U.S. 144, 161 (1992); *Printz v. United States*, 521 U.S. 898, 922 (1997). The Supremacy Clause requires state

courts to apply federal law.[2] In addition, state courts must entertain federal causes of action, though the national government cannot prescribe the procedural rules state courts must apply in such cases. *Howlett v. Rose*, 496 U.S. 356, 369-72 (1990). A principle safeguard of the independence of state courts lies in scrupulously enforcing the limits on the jurisdiction of federal courts. See *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("the judicial authority in Article III is limited by [State] sovereignty.")

For this reason, federal courts may exercise only those powers conferred by the Constitution and authorized by Congress. *Finley v. United States*, 490 U.S. 545, 547 (1989). *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978) ("For the jurisdiction of the federal courts is limited not only by the provisions of Art. III of the Constitution, but also by Acts of Congress."). Those limits must not be disregarded, *id.* at 374, and are "not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

B. This Court's Precedents Preclude the Use of the All Writs Act to Remove a State Court Action That Is Not Within the Removal Statute

---

[2] However, as the Court in *Erie* stated, the Constitution precludes the national government from dictating state law:

> Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78.

Based on the Defense of the Preclusive Effect of a Prior Federal Judgment.

In this case, the federal district court for the Southern District of Alabama purported to extend its power to a lawsuit in the state district court in Iberville Parish, Louisiana. That civil action, based solely on state law with nondiverse parties, could not have been filed in federal court in the first instance and did not satisfy the requirements prescribed by Congress for removal of state cases to federal court in 28 U.S.C. §1441. Indeed, the case fell outside the one-year time limit for removal imposed by Congress in § 1441.

The federal court nevertheless effectuated a removal and transfer of the case to itself and entered an order dismissing the case. The federal court asserted as the basis for its jurisdiction the All Writs Act, 28 U.S.C. § 1651(a). 261 F.3d at 1067.

As the Eleventh Circuit emphasized, this was not an instance in which there was no other means of giving effect to the prior federal judgment. 261 F.3d at 1071. Petitioners could have entered a defensive plea in state court of res judicata based on the prior federal judgment. Instead, the Louisiana court was deprived of jurisdiction and the state plaintiffs were obliged to travel to a distant forum to litigate essentially the same issue before the district court in Alabama.

The All Writs Act provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a).

This Court's precedents clearly preclude such a broad expansion of federal court jurisdiction at the expense of state courts.

Any notion that such expanded jurisdiction based on the All Writs Act is necessary for federal courts in the aid of their jurisdiction is belied by the fact that for 200 years no federal court asserted such expansive authority. *See* Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. Pa. L. Rev. 401, 415 (1999).[3]

The first reported decision to use the Act as a basis for expanding federal jurisdiction beyond the express limits set by Congress was *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir.1988), *cert. denied*, 489 U.S. 1077 (1989). The panel majority rejected the argument that the removal statutes provided the exclusive source of removal jurisdiction. Rather, the court stated, there exists a "residual jurisdictional authority" derived from the All Writs Act that permits removal in "exceptional cases." *Id.* at 864.

Many federal courts quickly followed the trail blazed by the Second Circuit. In the following decade, some thirty federal decisions relied on the All Writs Act, in whole or in part, as an independent basis for authority to remove otherwise unremovable cases. *See*

---

[3] The current statute closely tracks section 14 of the Judiciary Act of 1789:

> Sec. 14. That all the before-mentioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions,.

Hoffman, *supra*, at 412, n. 31 (citing cases). Many, like the present case, asserted jurisdiction under the Act on the basis of the preclusive effect of a prior federal judgment. *E.g., Ivy v. Diamond Shamrock Chems. Co.*, 996 F.2d 1425 (2d Cir. 1993); *Xiong v. Minnesota*, 195 F.3d 424 (8th Cir. 1999); *In re VMS Sec. Litig.*, 103 F.3d 1317 (7th Cir. 1996).[4]

These decisions cannot be reconciled with this Court's pronouncements regarding the limited jurisdiction of the lower federal courts.

Courts asserting an independent basis of jurisdiction frequently rely on language found in this Court's opinion in *United States v. New York Telephone Co.*, 434 U.S. 159 (1977). *See, e.g., Yonkers, supra*, 858 F.2d at 863; *Sable v. General Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996). *New York Telephone* upheld a federal court injunction ordering the telephone company to cooperate with the FBI in installing a pen register that had been authorized by the court under a federal criminal statute. The Court did not read the All Writs Act as expanding the federal court's jurisdiction. Rather, the Court stated only that a district court may invoke the All Writs Act "as may be necessary or

---

[4] Predictably, the threshold of "extraordinary circumstances" eroded considerably. For example in *Chance v. Sullivan*, 993 F. Supp. 565, 567 (S.D. Tex. 1998), plaintiffs who had settled a class action in federal court were unhappy with the way their attorney paid out the proceeds and deducted expenses. They filed suit in state court asserting state law claims of fraud and legal malpractice. The federal court that approved the settlement removed the case to adjudicate the claims. Little appears in the court's opinion why these circumstances are extraordinary or why it was necessary for the federal court to decide the case itself to protect its own jurisdiction.

appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction *otherwise obtained*." *Id.* at 163 (emphasis added). A second essential part of the Court's ruling was its finding that "without the [phone] Company's assistance there is no conceivable way in which the surveillance authorized by the District Court could have been successfully accomplished." *Id.* at 175.

In this case, as the court below indicated, there was no basis for the federal court to otherwise obtain jurisdiction over the Louisiana state suit. 261 F.3d at 1068 n.3. Moreover, as the lower court also pointed out, defendant had an adequate available remedy in state court. *Id.* at 1071. The issue before this Court is not whether a prior federal judgment shall be given effect. It is, rather, whether a federal court may divest a state court of jurisdiction over a case where a federal judgment is available as a defense. This Court's precedents clearly indicate that the federal court may not extend its reach so far.

A unanimous Court in *First Alabama Bank v. Parsons Steel, Inc.*, 474 U.S. 518 (1986), stated in a different context that "the important values of federalism and comity embodied in the Full Faith and Credit Act" compelled federal deference to the state court adjudication of a claim of res judicata based on the preclusive effect of a prior federal judgment. *Id.* at 523. The risk of an erroneous determination by the state court was not sufficient reason to override the authority of the state court. "Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be

pursued by way of appeal through the state-court system and certiorari from this Court." *Id.* at 525.

Shortly after the *Yonkers* decision, this Court eliminated the Second Circuit's essential premise that federal courts possess "residual jurisdictional authority." In *Finley v. United States*, 490 U.S. 545 (1989), the Court rejected the judge-made doctrine of pendant party jurisdiction, which had been asserted by lower federal courts without specific Congressional authorization. Justice Scalia wrote for the Court:

> It remains rudimentary law that "[a]s regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it.*"

Id. at 547-48 (emphasis the Court's), quoting *The Mayor v. Cooper*, 6 Wall. 247, 252 (1868). Moreover, "Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Id.* at 552-53, quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

To permit federal courts to bootstrap their own jurisdiction to reach beyond that authorized by Congress would render the rudimentary principle stated in *Finley* meaningless. That principle does not allow federal courts to expand the boundaries of their own jurisdiction based simply on the availability of the defense of claim preclusion by a prior federal judgment.

In *Rivet v. Regions Bank*, 522 U.S. 470 (1998), the Court addressed an issue closely analogous to that presented here. Defendants had removed a case from

Louisiana state court involving only Louisiana parties with claims based exclusively on Louisiana law, based on their assertion that plaintiffs' action was precluded as a matter of federal law by earlier Bankruptcy Court orders. Justice Ginsburg stated for a unanimous Court:

> This case presents the question whether removal may be predicated on a defendant's assertion that a prior federal judgment has disposed of the entire matter and thus bars plaintiffs from later pursuing a state-law-based case. We reaffirm that removal is improper in such a case.

Id. at 472. The Court, relying on the "well-pleaded complaint rule," and clarifying prior decisional law, held that claim preclusion based on a prior federal judgment "remains a defensive plea involving no recasting of the plaintiff's complaint, and is therefore not a proper basis for removal." *Id.* at 477.

Where, as here, the federal court is faced with a decision whether to remove the state case or allow the state court to proceed to decide the preclusive effect of the prior federal settlement decree, it is obliged to allow the state court to go forward. As the Court in *Rivet* declared:

> [C]laim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b). Such a defense is properly made in the state proceedings, and the state courts' disposition of it is subject to this Court's ultimate review.

Id. at 478.

The Court has very recently reaffirmed this principle. In *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, No. 01-408, 2002 WL 1155866 (June

3, 2002), the Court held that the Federal Circuit had no jurisdiction over a case in which the complaint did not allege a claim arising under federal patent law, but defendant's answer contained a patent-law counterclaim. Justice Scalia explained the Court's reasoning:

> Allowing a counterclaim to establish arising under jurisdiction would also contravene the longstanding policies underlying our precedents. First, since the plaintiff is the master of the complaint, the well-pleaded-complaint rule enables him, by eschewing claims based on federal law, to have the cause heard in state court. The rule proposed by respondent, in contrast, would leave acceptance or rejection of a state forum to the master of the counterclaim. It would allow a defendant to remove a case brought in state court under state law, thereby defeating a plaintiffs choice of forum, simply by raising a federal counterclaim. Second, conferring this power upon the defendant would radically expand the class of removable cases, contrary to the due regard for the rightful independence of state governments that our cases addressing removal require. And finally, allowing responsive pleadings by the defendant to establish arising under jurisdiction would undermine the clarity and ease of administration of the well-pleaded-complaint doctrine, which serves as a quick rule of thumb for resolving jurisdictional conflicts.

At *4. (internal citations omitted).

The federal court's removal in this case, based on the defense of federal claim preclusion, similarly contravenes this Court's definition of the boundaries of federal removal jurisdiction and the Court's deference to state court proceedings.

C. The All Writs Act Provides No Support for Expanding Jurisdiction Beyond that Provided by Statute Based on the Preclusive Effect of a Prior Federal Judgment.

1. The All Writs Act Should Be Narrowly Construed Against Expanding Federal Court Jurisdiction.

Even if the district court's removal in this case is not barred by this Court's prior precedents, removal cannot be supported by a proper interpretation of the All Writs Act.

It is the prerogative of Congress, not the courts themselves, to define the limits of the jurisdiction of the lower federal courts, within the powers provided by Article III of the Constitution. *Finley v. United States*. 490 U.S. 545 (1989); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). An unduly expansive interpretation by the courts of the All Writs Act invades that Congressional responsibility. As the Eleventh Circuit correctly stated:

> Too elastic an interpretation of the All Writs Act perverts it from a tool for effectuating Congress's intent in conferring jurisdiction on the lower federal courts into a device for judicially re-equilibrating a state-federal balance that is Congress's to strike.

261 F.3d 1071.

This Court has long understood that Congress did not intend the All Writs Act, and its predecessor, § 14 of the Judiciary Act of 1789, to expand federal jurisdiction over cases beyond those Congress has expressly provided for elsewhere by statute.

There was little debate in the First Congress concerning those provisions. However, there was considerable controversy as to whether a system of lower federal courts should exist and how much power to bestow on them. *See generally*, THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, ORGANIZING THE FEDERAL JUDICIARY: LEGISLATION AND COMMENTARIES 1-38 (Maeva Marcus et al. eds., 1992) As this Court recounted in *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), many of the Framers of the Constitution opposed creating a system of federal courts at all and felt "that the state courts could be entrusted to protect both state and federal rights." *Id.* at 285.

Ultimately, Congress struck a compromise in the Judiciary Act of 1789. The lower federal courts would be given certain limited powers; they were specifically denied power to review directly cases from state court. *Id.* at 286. *See* 28 U.S.C. §1257 (1999) (limiting federal review of state court proceedings to the Supreme Court).

In view of this controversy, the absence of debate concerning the writ power in sections 13 and 14 suggests that these provisions were not intended to invest the inferior federal courts with any additional jurisdiction. A straightforward reading of their text reflects Congress' intent "that the Act is investing courts with certain authority if and when they have independently founded jurisdiction, based on earlier sections of the Act." Akhil Reed Amar, *Marbury, Section 13, And The Original Jurisdiction Of The Supreme Court*, U. Chi. L. Rev. 443, 459 (1989). Any suggestion that the writs provisions endowed the lower federal courts with additional, undefined jurisdiction beyond that which

was carefully defined elsewhere in the Judiciary Act would most certainly have stirred serious opposition. *See* Hoffman, *supra,* at 435-36.

The decisions of this Court, from the earliest to the most recent, have consistently confirmed this understanding that the All Writs Act was not designed as a basis of independent jurisdiction. See *McClung v Silliman,* 19 U.S. (6 Wheat) 598, 601-02 (1821) (Section 14 "could only have been intended to vest the power now contended for in cases where the jurisdiction already exists"); *Clinton v. Goldsmith,* 526 U.S. 529, 534-35 (1999) ("the express terms of the Act confine the power of the [court] to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction").

Thus, application of the All Writs Act to this case must give effect to Congress's intent not to expand the jurisdiction of lower federal courts beyond the boundaries specifically set forth by Congress.

2. Removal Under the All Writs Act Is Not "Necessary or Appropriate" Where the Preclusive Effect of a Prior Federal Judgment may be Asserted in State Court

The power invested in federal courts by §1651(a) is "essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Clinton v. Goldsmith,* 526 U.S. 529, 538 (1999). *See also Allied Chem. Corp. v. Daiflon, Inc.,* 449 U.S. 33, 35 (1980)("In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires").

This principle has led this Court to require federal courts to allow parties to seek their remedy in state court, rather than interfere with the state court action. *See Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 630 (1977) (Under the Anti-Injunction Act, "'any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy'" *Id.* at 630, quoting *Atlantic Coast Line R.R., supra,* at 297; *Parsons Steel, Inc. v. First Alabama Bank,* 474 U.S. 518, 525 (1986) ("Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment may be pursued by way of appeal through the state-court system and certiorari from this Court.")

The unspoken premise of Petitioners' insistence that the federal district court in Alabama determine the preclusive effect of the prior settlement in this case is an assumption that the Louisiana state court is not competent to make that determination correctly. Such an assumption is foreign to our federalist system in which "[c]oncurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule." *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 507-08 (1962). "Under this system of dual sovereignty," the Court has stated, "we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt,* 493 U.S. 455,458 (1990).

This Court has explicitly rejected Petitioners' lack of confidence in state courts:

> The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the "gap" complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. . . . We cannot assume that this confidence has been misplaced.

Amalgamated Clothing Workers v. Richman Brothers Co., 348 U.S. 511, 518 (1954).

Even when constitutional rights are at stake, this Court has emphasized that "[m]inimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). Surely federal courts must equally respect the competency of state courts to enforce prior federal judgments.

There is simply no principled or practical basis for denying that respect to state courts. Res judicata is not a peculiarly federal principle of law; indeed, as in this case, its application may involve the application of state law.[5]

---

[5] Indeed, it is generally recognized that "state law governs the applicability of the doctrine of res judicata or collateral estoppel in a federal court action in which jurisdiction is based solely on diversity of citizenship of the parties, at least where the issues involved in the prior judgment were issues of state law." Annot., "State Or Federal Law As Governing Applicability Of Doctrine Of Res Judicata Or Collateral Estoppel In Federal Court Action," 19 A.L.R. Fed. 709 at § 3 (1974).

Nor can it be presumed that the court which entered a federal judgment is the only tribunal equipped to ascertain its scope. State courts routinely apply claim preclusion principles to judgments they have not entered and routinely enforce contracts they had no hand in drafting. Such documents should stand on their own. To hold otherwise may tempt negotiating parties to evade difficult or contentious issues, glossing over the rights of strangers with ambiguous language, each side confident the district court will favor their position should those strangers come to call.

Finally, it should not be ignored that federal judges are human. Following resolution of a long and arduous dispute, an apparent attempt to unravel that resolution may understandably engender some exasperation on the part of the judge. *See, e.g., Chance v. Sullivan*, 993 F. Supp. 565, 567 (S.D. Tex. 1998)("Finally, nothing would please this Court more than to send these claims back to state court, a sentiment apparently equally matched by Plaintiffs' desire to avoid this Court. The underlying litigation in this case began almost six years ago and has been an extremely protracted, extraordinarily burdensome affair.")

To allow a state court with fresh eyes to rule on the preclusive effect of a federal settlement order does not detract from the federal court's jurisdiction. "Federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999)

3. Removal Under the All Writs Act to Enforce the Preclusive Effect of a Prior Federal Judgment Is Not Necessary "In Aid of [the Court's] Jurisdiction."

Petitioners argue forcefully that it was necessary to remove plaintiff's state court case to federal court to ensure that the company obtained the benefit of the bargain it had struck. Brief for Petitioners at 16-17. Petitioners fail to explain how enforcement of their rights necessarily aids the jurisdiction of the court.

In *United States v. New York Telephone Co.*, 434 U.S. 159 (1977), Justice Stevens, joined in dissent by three other justices, pointed out,

> The fact that a party may be better able to effectuate its rights or duties if a writ is issued never has been, and under the language of the statute cannot be, a sufficient basis for issuance of the writ. . . . Not all orders that may enable a party to effectuate its rights aid the court in its exercise of jurisdiction."

Id. at 189 & n.20.(Stevens, J., dissenting in part).

In this case, Petitioners obviously believe their defense of claim preclusion is likelier to prevail in the federal district court in Alabama than in the Louisiana court. But unless the court's interest in its jurisdiction is to be deemed coextensive with defendant's interest in successfully reaping the benefits of their negotiated settlement, Petitioners do not establish that it is necessary to the federal court's jurisdiction that the state court be prevented from deciding that matter.

4 Removal Under the All Writs Act Was Not Necessary To Aid the Jurisdiction Of the Issuing Court.

This case presents an additional obstacle to use of the All Writs Act to support removal jurisdiction. Respondents' state court case was removed to the federal court for the Eastern District of Louisiana. It was then transferred to the Southern District of Alabama. 261 F.3d 1067. As this Court has explained, "[w]hile the All Writs Act authorizes employment of extraordinary writs, it confines the authority to the issuance of process 'in aid of' the *issuing court's* jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999) (emphasis added)

Regardless of the interest of the Alabama federal court, the Louisiana district court clearly had no jurisdictional stake in this matter. *Compare Hillman v. Webley*, 115 F.3d 1461, 1469-70 n.6 (10th Cir. 1997) (where the federal district court in Colorado approved a settlement, removal of a subsequently filed California state action would only have been proper to the federal district court in California pursuant to § 1441).

To authorize every federal district court to command the removal to itself of any state court case anywhere in the country that may touch upon a federal decree would constitute a drastic expansion of federal jurisdiction that is certainly beyond the intent of Congress in enacting the removal statutes.

II. Neither the Doctrine of Ancillary Jurisdiction Nor Statutory Supplemental Jurisdiction Provides and Independent Basis for Removal of State Court Actions

A. The Judicial Doctrine of Ancillary Jurisdiction Is Not Available in this Case.

The Petition sought certiorari on the basis that the Eleventh Circuit's decision conflicted with decisions of other Circuits that the All Writs Act itself provides jurisdiction to remove state cases. *See* Pet. at 7. Petitioners in their merits brief abandoned that argument. Instead, Petitioners argue that the doctrine of ancillary jurisdiction provides a basis for the removal in this case. *See* Brief for Petitioners at 14-15.

Petitioners rely almost entirely on two decisions of this Court. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), held a federal court that had approved a settlement agreement possessed no ancillary jurisdiction over state law claims based on breach of that agreement. *Id.* at 379. In *Peacock v. Thomas*, 516 U.S. 349 (1996), the Court held a federal court that had entered judgment for plaintiff in a class action possessed no ancillary jurisdiction over a subsequent lawsuit by the federal judgment creditor seeking to impose liability for the judgment on an officer of the corporate defendant. *Id.* at 359. Petitioners attempt to tease out of dicta in these two opinions some basis for ancillary jurisdiction in this case. These attempts fail for two reasons.

First, Petitioners failed to raise this issue below. As the Eleventh Circuit stated, "Ciba-Geigy did not, furthermore, assert ancillary jurisdiction . . . and we

therefore do not address it as a potential basis." 261 F.3d at 1068, n.3.

Second, the judicial doctrine of ancillary jurisdiction as been superseded by statute and does not apply in this case. In *Finley v. United States*,. 490 U.S. 545 (1989), this Court rejected the judicial doctrine known as pendant party jurisdiction, absent Congressional authorization, casting doubt on the continued validity of the related judicial doctrines of pendant claim and ancillary jurisdiction. In response, Congress enacted the Judicial Improvements Act of 1990. Section 310 of that Act amended Title 28 of the United States Code by adding section 1367, the Supplemental Jurisdiction Statute. *See*, Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 13 Federal Practice and Procedure: Jurisdiction and Related Matters 2d, § 3523, at 65 (Supp. 1999).[6]

---

[6] The Supplemental Jurisdiction Statute provides, in part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19

Congress intended the statute "to codify the doctrines of pendent and ancillary jurisdiction under the common rubric of supplemental jurisdiction." James E. Pfander, *Supplemental Jurisdiction And Section 1367: The Case For A Sympathetic Textualism*, 148 U. Pa. L. Rev. 109, 116 (1999); *see also, Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 881 n.2 (5th Cir. 1993) ("What was referred to formerly as 'ancillary jurisdiction' is now included within the category of 'supplemental jurisdiction.'").

Congress also provided that § 1367 was prospective only, suggesting that it was not merely a codification of existing law. Judicial Improvements Act of 1990, Pub. L. No. 101- 650, § 310(c), 104 Stat. 5089, 5114 ("The amendments made by this section shall apply to civil actions commenced on or after the date of the enactment of this Act."). The date of enactment was December 1, 1990. *See* 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE s 3523, at 26, n.57.3 (Supp. 1994) (it is "crystal clear" that the statute applies only to claims sought to be appended to underlying actions commenced after its effective date).

Cases filed prior to that date are governed by prior case law regarding ancillary jurisdiction. In *Peacock*, for example, where the underlying class action

---

of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1367

was filed in 1987, 516 U.S. at 352, prior decisional law therefore applied.[7]

In this case, counsel for Respondent informs amicus that the *Price* lawsuit was filed in Alabama state court and then removed to the federal court in August 1994. The supplemental jurisdiction statute clearly applies. Inexplicably, Petitioners make no mention of 28 U.S.C. § 1367 in their brief.

Any argument that the court-made doctrine of ancillary jurisdiction should apply in disregard of a Congressional enactment expressly providing for such authority would contradict this Court's rationale in *Finley* and its instruction that "neither the convenience of the litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction." 490 U.S. at 552.

In any event, Petitioners have utterly failed to preserve this issue.

B The Supplemental Jurisdiction Statute Does Not Provide a Basis for Removal.

Even accepting that Petitioners' assertion of ancillary jurisdiction is properly before this Court, the Supplemental Jurisdiction Statute does not support removal of Respondents' state law case.

---

[7] The Court's Kokkonen opinion does not indicate when the underlying action was filed. The Court cited § 1367 with an introductory "cf." signal, indicating the statute was not directly applicable to the case. 511 U.S. at 380. However, the unpublished opinion of the lower court indicates that Kokkonen filed that lawsuit in April, 1991. *Kokkonen v. Guardian Life Ins. Co. of America*, 1993 WL 164884, **1 (9th Cir. 1993) (unpublished opinion).

First, as the Eleventh Circuit correctly noted, § 1367 cannot provide the original jurisdiction required by the removal statute, 28 U.S.C. § 1441. 261 F.3d at 1068, n.3. The plain text of § 1367(b) imposes strict limits on the availability of supplemental jurisdiction in connection with cases based solely on diversity, such as the case in Alabama federal district court. Supplemental jurisdiction is denied where its use would be "inconsistent with the jurisdictional requirements of section 1332." This statutory language reflects Congress's stated intention to bar the use of supplemental jurisdiction "to evade the jurisdictional requirement of 28 U.S.C. § 1332 . . . [by] adding claims not within original federal jurisdiction" H.R. Rep. No. 101-734, 101st Cong., 2d Sess. 29, reprinted in 1990 U.S.C.C.A.N. 6860, 6874.

Consequently, federal courts have consistently held that the Supplemental Jurisdiction Statute cannot provide a basis for removing a state court case that is not otherwise removable. *See Ahearn v. Charter Township*, 100 F.3d 451, 456 (6th Cir. 1996) (the "supplemental-jurisdiction statute is not a source of original subject- matter jurisdiction, and a removal petition therefore may not base subject-matter jurisdiction on the supplemental-jurisdiction statute"); *Frankenberg v. Superior Distribs., Inc.*, 961 F. Supp. 1560, 1566 (S.D. Ala. 1997) (use of the statute "for establishing subject matter jurisdiction, in my opinion, would extend the doctrine of supplemental jurisdiction too broadly."); *Parker v. Crete Carrier Corp.*, 914 F. Supp. 156, 159 (E.D. Ky. 1996) ("Supplemental jurisdiction cannot destroy the requirement for complete diversity"); *Sebring Homes Corp. v. T.R. Arnold & Assocs., Inc.*, 927 F. Supp. 1098, 1101 (N.D. Ind. 1995) ("The supplemental

jurisdiction statute does not confer original jurisdiction on claims or suits."); *In re Estate of Tabas*, 879 F. Supp. 464, 467 (E.D. Pa. 1995) ("the supplemental jurisdiction statute does not allow a party to remove an otherwise unremovable action to federal court" and "is not . . . an independent source of removal jurisdiction"); *Zewe v. Law Firm of Adams & Reese*, 852 F. Supp. 516, 520 (E.D. La. 1993) ("a district court does not have supplemental jurisdiction under 28 U.S.C. § 1367 to entertain the merits of claims in a state court suit which was removed without original jurisdiction"); *Holt v. Lockheed Support Sys., Inc.*, 835 F. Supp. 325, 329 (W.D. La. 1993) ("Defendant's application of 28 U.S.C. § 1367 would impermissibly broaden this court's removal jurisdiction"); *see also* 13B Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 3567.3, at 63 (2d ed. Supp. 1999) ("The supplemental- jurisdiction statute is not a source of original jurisdiction and a case cannot be brought or removed on grounds of supplemental jurisdiction alone.").

Second, removal of Respondents' Louisiana state court action cannot be said to be either ancillary or supplementary to any case within the jurisdiction of the federal court purporting to exercise that power, the Eastern District of Louisiana.

Third, and more broadly, removal on the basis of either ancillary or supplemental jurisdiction suffers from the same deficiencies amicus has described earlier with respect to independent jurisdiction under the All Writs Act. The exercise of such authority is not necessary where an adequate remedy is readily available in the form of raising a defensive plea of res judicata in the state court based on the prior federal judgment. Removal under such circumstances, whether based on ancillary or supplemental jurisdiction,

conflicts with the respect and comity owed to the courts of the sovereign states.

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR EXPANDING THE SCOPE OF FEDERAL COURT JURISDICTION.

ATLA supports affirmance of the lower court's decision on the basis of its proper application of the narrow scope of the All Writs Act. If, however, this Court is persuaded that federal courts should be accorded greater authority to interfere with state court proceedings and that different boundaries should be set on federal court jurisdiction, ATLA suggests that this case is not an appropriate vehicle for doing so.

First, although the Petition for Certiorari sought review of the question whether the All Writs Act provided an independent basis of jurisdiction, Petitioners subsequently abandoned that argument. See Brief for Petitioners at 9. This case no longer presents the question initially contemplated in the Petition. *See Jones v. Hildebrant*, 432 US 183 (1977) (dismissal as improvidently granted is appropriate where it becomes clear that the case "does not present the precise question stated in the petition or passed upon below.")

Second, Petitioners in this Court seek reversal on the basis of the doctrine of ancillary jurisdiction. However, as the lower court indicated, that Petitioners did not raise that argument below, and the court therefore did not address that potential basis for jurisdiction. 261 F.3d at 1068, n.3.

Third, Petitioners make no mention of the Supplemental Jurisdiction Statute, which on its face

appears directly applicable to their assertion of ancillary jurisdiction.

Because these issues have not been properly preserved or are not fully addressed by Petitioners in this Court, ATLA suggests that this case does not offer an appropriate vehicle for redefining the boundaries on federal court jurisdiction.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

Jeffrey Robert White
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
ATLA Senior Amicus Counsel
Counsel of Record

June 5, 2002

(10)

No. 01-757

FILED
JUN 4 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC., ROBERT BABB, EDEE TEMPLET, and KENNETH A. DEVUN,

Petitioners,

v.

HURLEY HENSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENT

ARTHUR H. BRYANT
TRIAL LAWYERS FOR PUBLIC JUSTICE
One Kaiser Plaza
Suite 275
Oakland, CA 94612
Telephone: (510) 622-8150

MICHAEL J. QUIRK
TRIAL LAWYERS FOR PUBLIC JUSTICE
1717 Massachusetts Ave. NW
Suite 800
Washington, DC 20036
Telephone: (202) 797-8600

ADAM SAMAHA
Counsel of Record
ROBERTA B. WALBURN
MARTHA K. WIVELL
ROBINS, KAPLAN, MILLER & CIRESI, L.L.P.
2800 LaSalle Plaza
800 LaSalle Ave.
Minneapolis, MN 55402-2015
Telephone: (612) 349-8500

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

35 pp

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of *Amicus Curiae*	1
Statement of the Case	2
Introduction	3
Summary of Argument	6
Argument	7
I. The Removal Statutes Prohibit Removal Under These Circumstances	7
A. Petitioners Invoked the Advantages, But Failed to Satisfy the Conditions, of the Removal Statutes	7
B. The All Writs Act Is No Cure for the Absence of Original Jurisdiction	9
C. Ancillary Enforcement Jurisdiction Is No Cure	10
II. The All Writs Act Does Not Provide Any Removal Authority.	13
A. Evidence of Original Intent Bars Removal	14
B. Contemporary Law Confirms the Conclusion	16
C. Removal Is Unnecessary to Protect the Federal Judiciary Or Defendants' Interests	19
1. State-court defense	20
2. Anti-suit injunctions	21
Conclusion	26

TABLE OF AUTHORITIES

Page

CASES:

Adams v. *United States ex rel. McCann*, 317 U.S. 269 (1943) 18

Ahearn v. *Charter Township of Bloomfield*, 100 F.3d 451 (CA6 1996) 12

Allied Chem. Corp. v. *Daiflon, Inc.*, 449 U.S. 33 (1980) *(per curiam)* 19

Amalgamated Clothing Workers of Am. v. *Richman Bros.*, 348 U.S. 511 (1954) 20

Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997) 4, 18

Atlantic Coast Line R. Co. v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970) 5, 20, 21, 22, 25

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) 5

Carlisle v. *United States*, 517 U.S. 416 (1996) 17, 18

Caterpillar, Inc. v. *Williams*, 482 U.S. 386 (1987) 8, 16

Chicago & A.R. Co. v. *Wiggins Ferry Co.*, 108 U.S. 18 (1883) 21

Chick Kam Choo v. *Exxon Corp.*, 486 U.S. 140 (1988) 3, 20, 21, 22, 23

City of Chicago v. *International College of Surgeons*, 522 U.S. 156 (1997) 12

Clinton v. *Goldsmith*, 526 U.S. 529 (1998) 9, 19

Cohen v. *Reed*, 868 F. Supp. 489 (E.D.N.Y. 1994) 12

County of Imperial v. *Munoz*, 449 U.S. 54 (1980) 25

TABLE OF AUTHORITIES – Continued

Page

Dietzsch v. *Huidekoper*, 103 U.S. (13 Otto) 494 (1880) 10

Donovan v. *City of Dallas*, 377 U.S. 408 (1964) 5

Dugas v. *American Surety Co. of N.Y.*, 300 U.S. 414 (1937) 10

In re Federal Skywalk Cases, 680 F.2d 1175 (CA8), *cert. denied*, 459 U.S. 988 (1982) 25

Franchise Tax Bd. of Cal. v. *Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1 (1983) 8

FTC v. *Dean Foods Co.*, 384 U.S. 597 (1966) 18, 19, 20

In re Glenn W. Turner Enterprises Litig., 521 F.2d 775 (CA3 1975) 25

Harris v. *Nelson*, 394 U.S. 286 (1969) 18

Henson v. *Ciba-Geigy Corp.*, 261 F.3d 1065 (CA11 2001) 12

Julian v. *Central Trust Co.*, 193 U.S. 93 (1904) 11

Kline v. *Burke Constr. Co.*, 260 U.S. 226 (1922) 5, 25

Kokkonen v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994) 3, 5, 10, 20

Kulko v. *Superior Court*, 436 U.S. 84 (1978) 5

La Buy v. *Howes Leather Co.*, 352 U.S. 249 (1957) 18

Lexecon Inc. v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) 4, 18

Local Loan Co. v. *Hunt*, 292 U.S. 234 (1934) 10, 12, 21

McClellan v. *Carland*, 217 U.S. 268 (1910) 18

McClelland v. *Longhitano*, 140 F. Supp. 2d 201 (N.D.N.Y. 2001) 12

TABLE OF AUTHORITIES – Continued

Page

Mesa v. *California*, 489 U.S. 121 (1990) 16

Milwaukee & Minn. R.R. Co. v. *Soutter*, 69 U.S. (2 Wall.) 609 (1865) 11

Missouri v. *Jenkins*, 495 U.S. 33 (1990) 11

Mitchum v. *Foster*, 407 U.S. 225 (1972) 21

Oklahoma Tax Comm'n v. *Graham*, 489 U.S. 838 (1989) *(per curiam)* 8, 17

Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) 4, 21, 25

Parsons Steel, Inc. v. *First Ala. Bank*, 474 U.S. 518 (1986) 20, 23

Peacock v. *Thomas*, 516 U.S. 349 (1996) 10

Pennsylvania Bureau of Corrections v. *United States Marshals Serv.*, 474 U.S. 34 (1985) 16, 17

Pennzoil Co. v. *Texaco, Inc.*, 481 U.S. 1 (1987) 20

Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 21

Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 10

Rivet v. *Regions Bank of La.*, 522 U.S. 470 (1998) 4, 8, 9, 20, 23

Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) 17

Root v. *Woolworth*, 150 U.S. 401 (1893) 11

Rosenbaum v. *Bauer*, 120 U.S. 450 (1887) 9

Sampson v. *Murray*, 415 U.S. 61 (1974) 18

Sebring Homes Corp. v. *T.R. Arnold & Assocs.*, 927 F. Supp. 1098 (N.D. Ind. 1995) 12

TABLE OF AUTHORITIES – Continued

Page

Semtek Int'l Inc. v. *Lockheed Martin Corp.*, 531 U.S. 497 (2001) 21

Shamrock Oil & Gas Corp. v. *Sheets*, 313 U.S. 100 (1941) 8

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 13

Stone v. *Powell*, 428 U.S. 465 (1976) 20

Supreme Tribe of Ben Hur v. *Cauble*, 255 U.S. 356 (1921) 10

In re Estate of Tabas, 879 F. Supp. 464 (E.D. Pa. 1995) 12

Tafflin v. *Levitt*, 493 U.S. 455 (1990) 20

Toucey v. *New York Life Ins. Co.*, 314 U.S. 118 (1941) 5, 23

United States v. *FMC Corp.*, 84 S.Ct. 4 (1963) (Goldberg, J., in chambers) 17

United States v. *Morgan*, 346 U.S. 502 (1954) 18

United States v. *New York Tel. Co.*, 434 U.S. 159 (1977) ..... *passim*

United States Alkali Export Ass'n v. *United States*, 325 U.S. 196 (1945) 17

Vendo Co. v. *Lektro-Vend Corp.*, 433 U.S. 623 (1977) 25

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) 5

Younger v. *Harris*, 401 U.S. 37 (1971) 21

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 21

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

An Act to establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789) 15

9 U.S.C. §205 17

12 U.S.C. §632 17

12 U.S.C. §1819 17

22 U.S.C. §286g 17

28 U.S.C. §1367 ..... 12, 14

28 U.S.C. §1441 ..... *passim*

28 U.S.C. §1442 17

28 U.S.C. §1442a 14

28 U.S.C. §1443 17

28 U.S.C. §1444 17

28 U.S.C. §1445 17

28 U.S.C. §1446 ..... *passim*

28 U.S.C. §1447 ..... 8, 14, 17

28 U.S.C. §1448 17

28 U.S.C. §1449 17

28 U.S.C. §1450 17

28 U.S.C. §1451 17

28 U.S.C. §1452 17

28 U.S.C. §1651 ..... 3, 17, 13, 16, 17

28 U.S.C. §2283 ..... 18, 21, 22, 25

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. §2679 17

39 U.S.C. §409 17

RULES:

Fed. R. Civ. P. 23 4

Fed. R. Civ. P. 65 21

Supreme Court Rule 37.3 1

BILLS:

H.R. 2341, 107th Cong. (2001) 6

S. 1712, 107th Cong. (2001) 6

OTHER SOURCES:

J. Coffee, Class Wars, 95 Colum. L. Rev. 1343 (1995) 4

R. Fallon, Jr., *et al.*, Hart and Wechsler's The Federal Courts and the Federal System (4th ed. 1996) 14, 16

F. Frankfurter & J. Landis, The Business of the Supreme Court (1928) 14

D. Hensler, Revisiting the Monster, 11 Duke J. Comp. & Int'l L. 179 (2001) 4

L. Hoffman, Removal Jurisdiction and the All Writs Act, 148 U. Pa. L. Rev. 401 (1999) 16

H. Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 Colum. L. Rev. 1148 (1998) 4, 21

TABLE OF AUTHORITIES – Continued

Page

C. Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923).....14

www.classactionreports.com/classactionreports/stats.htm 4

www.uscourts.gov/judbususc/judbus.html 4

INTEREST OF *AMICUS CURIAE*

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation. TLPJ is dedicated to using trial lawyers' skills and strategies to advance the public good. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. TLPJ has filed dozens of *amicus* briefs in support of those objectives.

As part of its effort to ensure the proper working of the civil justice system, TLPJ has fought to preserve injury victims' claims from unconstitutional encroachment, federal preemption, and class action abuse. In fact, TLPJ is the only national public interest law firm that both prosecutes class actions on a broad range of issues *and* has a special project dedicated to fighting class action abuse. One danger posed by large-scale federal class actions involves the temptation for lower federal courts to improperly extend their jurisdiction and interfere with pending state judicial proceedings in the interest of "global peace." We submit this brief to explain why, under our Constitution, laws, and federal system of government, this Court should affirm the judgment of the Court of Appeals and reject petitioners' attempt to manufacture removal jurisdiction.[1]

---

[1] Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members or its counsel, have made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief under Supreme Court Rule 37.3(a). Copies of those consents have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Respondent and others filed a tort suit against petitioners in a Louisiana state trial court in 1993. A putative class action, the suit sought compensation for exposure to chemicals at a particular Louisiana facility. The claims arose under state law and the individual defendants defeated complete diversity of citizenship. In 1994, another putative class action involving similar chemical exposures was filed in an Alabama state trial court. However, that suit ultimately satisfied complete diversity and was removed to an Alabama federal district court later that year. Respondent subsequently intervened in the federal suit, and the Louisiana state court stayed respondent's state suit. J.A. 79. In 1995, the Alabama federal district court simultaneously certified a nationwide class and approved a class-wide settlement. J.A. 88–89. The stipulation of settlement stated that class counsel agreed that respondent's state suit would be dismissed with prejudice. J.A. 36, 38. The court's judgment stated the court would retain jurisdiction over "future performance of, and any claims related to performance of, the Settlement agreement and judgment." J.A. 88.

Three years later, in 1998, class counsel for the federal plaintiffs finally asked the Louisiana state trial court to dismiss respondent's suit. J.A. 75. Respondent's attorney replied that the federal settlement had not settled all of the claims asserted in state court. J.A. 80–85. The trial court stated that it would dismiss respondent's claims regarding one chemical and product, but it granted respondent permission to file an amended petition that would include only unsettled claims. See J.A. 86. Respondent's counsel filed an amended petition in September 1998. J.A. 60.

Dissatisfied with the state court's failure to immediately dismiss the entire suit, petitioners were faced with at least four strategies. The first two were proper; the others were not: (1) argue in state court that the federal decree required dismissal of all claims and, if necessary, appeal;

(2) return to the Alabama federal district court, invoke its ancillary jurisdiction to enforce its prior judgment, see *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994), and request declaratory relief or an injunction ordering respondent to dismiss the state suit, see *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 145–148 (1988); (3) return to the Alabama federal district court, invoke its ancillary enforcement jurisdiction, and request outright removal of the state suit under the All Writs Act, 28 U.S.C. §1651(a); or (4) file a notice of removal in a Louisiana federal district court in accord with the removal statutes, *id.* §§1441 *et seq.*, receive an automatic stay of the state proceedings, see *id.* §1446(d), and assert the All Writs Act and/or ancillary jurisdiction as a cure for jurisdictional and procedural deficiencies.

Petitioners chose strategy (4). On October 13, 1998, they filed a notice of removal in a Louisiana federal district court and a motion for transfer to Alabama, J.A. 58, 65 — even though the parties lacked complete diversity of citizenship, no federal question was presented in the complaint, the state suit commenced years before the notice of removal, and petitioners had not requested a remedy from the federal district court that had approved the settlement.

INTRODUCTION

Although not at historic highs, class actions have become an important part of the federal docket. They can be appropriate and efficient vehicles for resolving disputes involving countless injuries, particularly when each individual injury is relatively small. But there is the potential for abuse at the expense of the "inventory" of individuals who are injured, and those who are not yet injured at all. Class counsel can be too eager to settle on the cheap, provided that attorney fees are sufficiently

attractive.[2] To prevent abuse and to ensure that Congress is involved in any further centralizing of federal litigation, this Court has been sensitive to existing rules and jurisdictional limits. See *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (extension of multi-district litigation transferee court authority is for Congress); *Ortiz*, 527 U.S., at 842, 861–864; *Amchem*, 521 U.S., at 597, 620–622, 628–629 (refusing to extend Fed. R. Civ. P. 23 despite the district court's attempt to help settle "an asbestos-litigation crisis").

This case likewise involves the scope of federal judicial power over class actions, but after a settlement rather than before. Specifically, petitioners and defendants like them are trying to find a way to route back to federal court disputes over whether a prior federal judgment precludes pending state suits. This case is not simply about the authority of a federal court to interpret and enforce its own decrees, however, because defendants are demanding more. What they want is a removal procedure that will immediately, without prior judicial involvement, oust state courts of jurisdiction over state-law claims against non-diverse defendants when a preclusion defense is alleged — at least if a federal court has retained jurisdiction over a settlement of "complex" litigation. Their preferred removal scheme runs into immediate difficulties, of course, because the removal statutes that Congress enacted forbid it, *Rivet*

[2] See, *e.g.*, J. Coffee, Class Wars, 95 Colum. L. Rev. 1343 (1995), cited in *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 621 (1997); D. Hensler, Revisiting the Monster, 11 Duke J. Comp. & Int'l L. 179, 189–190 (2001); H. Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 Colum. L. Rev. 1148, 1149, n. 1, 1155–1156 (1998); see also *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846–847, and n. 23 (1999). For statistics on federal class action filings dating back to 1972, visit www.classactionreports.com/classactionreports/stats.htm. More recent data indicating an increase in federal filings is available at www.uscourts.gov/judbususc/judbus.html, in Tables X-4 and X-5 of the posted reports. There is no centralized clearinghouse for data on state court class actions.

v. *Regions Bank of La.*, 522 U.S. 470 (1998), and because of the rather dramatic impact it would have on state proceedings and the claimants therein.

In addition to more specific concerns, three general principles counsel affirmance. First, adherence to the principle of separation of powers requires a narrower scope of federal jurisdiction. Federal courts are tribunals of limited rather than general jurisdiction. *Kokkonen*, 511 U.S., at 377. That jurisdiction is confined both by Article III of the Constitution and by acts of Congress. "[C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807) (Marshall, C.J.). Federal jurisdiction thereby requires an affirmative statutory grant from Congress. *Kokkonen*, 511 U.S., at 377. And the burden of persuasion rests with the party asserting jurisdiction. *Ibid.* It may not be manufactured by judicial creativity or litigant convenience.

Second, American federalism mandates respect for state judicial proceedings, even when a "duty of 'hands off' by the federal courts," *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 132 (1941), seems inefficient. Parallel litigation is an accepted consequence of our dual court system and concurrent jurisdiction. "Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system." *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970); accord *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234–235 (1922). Absent congressionally conferred removal jurisdiction or an exception to the Anti-Injunction Act, neither system may order the other to halt. See *Donovan* v. *City of Dallas*, 377 U.S. 408, 412–414 (1964); *Kline*, 260 U.S., at 234–235.

Third, individuals claiming injury and seeking judicial redress have a legitimate interest in selecting an appropriate forum to adjudicate their grievances, see *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980); *Kulko* v. *Superior Court*, 436 U.S. 84, 92 (1978)

(due process analysis), which should have particular force when wholly state-law claims are asserted in a state court.

There may be legitimate policy arguments for expanding the federal docket to reach more class actions involving state-law claims. Congress is considering legislation along these lines. See H.R. 2341, 107th Cong. (2001); S. 1712, 107th Cong. (2001). But there is no need or authority for this Court to redraw jurisdictional boundaries. The risk of vexatious litigation and erroneous state court decisions under the present system is at least offset by the potential for abuse when grounds for removal are added to the statutes, even if the new grounds are less vague than petitioners' proposal; and it is overwhelmed by respect for Congress as the proper venue for reform proposals, combined with respect for state courts in their duty to adjudicate state-law claims and federal defenses.

SUMMARY OF ARGUMENT

The removal statutes afford particular advantages to those seeking relief, at the expense of orderly state proceedings. But those statutes also impose conditions on removal, at least one of which cannot be satisfied here: a federal defense based on a prior federal decree does not provide the original jurisdiction required for removal under 28 U.S.C. §1441 (Part I.A.). The All Writs Act, petitioners now concede, cannot mend that deficiency (Part I.B.). Nor can ancillary enforcement jurisdiction, which provides federal jurisdiction over certain supplemental enforcement proceedings (Part I.C.).

The analysis can end there, but it is also apparent that the All Writs Act lacks any removal authority. That was surely true as of the Judiciary Act of 1789 (Part II.A.), and later developments and contemporary legal values reenforce the conclusion that the removal statutes govern removal (Part II.B.). Any doubts can be resolved with regard to federalism principles and the adequacy of state court jurisdiction to assess federal defenses to state claims (Part II.C.1.). Finally, the Anti-Injunction Act imposes a

ceiling on any residual removal authority; and although the Act might permit a district court to consider issuing a stay of state proceedings in a case like this, it is a remedy that should always be preferred to the intrusion of petitioners' removal proposal (Part II.C.2.).

ARGUMENT

I. THE REMOVAL STATUTES PROHIBIT REMOVAL UNDER THESE CIRCUMSTANCES.

The question on which this Court granted certiorari tied the outcome of the case to the removal statutes: "Whether the All Writs Act, 28 U.S.C. §1651(a), vests federal district courts with authority to *exercise removal jurisdiction under 28 U.S.C. §1441* . . . ." Pet. for Cert. i (emphasis added). The answer is no, and it is no longer clear that petitioners disagree.

A. Petitioners Invoked the Advantages, But Failed to Satisfy the Conditions, of the Removal Statutes.

The general removal statutes are exceptional for the procedural advantages that they confer upon those seeking relief. Within the confined class of cases to which they apply, Congress' policy is to grant relief first and permit state court plaintiffs to ask questions later. First, the statutes provide that the federal district court in which the notice of removal is filed assumes jurisdiction immediately upon proper filing and service of the notice. 28 U.S.C. §1446(a)–(b), (d). Unlike attempts to remove state criminal prosecutions, §1446(c)(4), the statute does not provide for federal judicial screening as state civil actions are removed. Second, proper filing and service of a removal notice triggers an automatic stay of state civil proceedings. The state court from which the action has been removed "shall proceed no further unless and until the case is remanded." §1446(d); see also §1447(c). Finally and consequently, the onus is on the plaintiff to file a motion seeking

remand to state court. See §1447(c). But cf. *ibid.* (recognizing district courts' obligation to remand for lack of subject matter jurisdiction); §1447(d) (limiting appellate review of remand orders). Invoking the removal statutes is therefore an attractive option for state court defendants like petitioners who desire federal judicial involvement. But cf. §1447(c) (remand orders may include an award of attorney fees).

Yet accompanying these advantages are certain conditions, which must be honored. Any circumvention of these conditions disturbs the federal-state balance that Congress selected, permits federal courts to assume jurisdiction that is the legislature's to give, and inappropriately extinguishes state jurisdiction over state claims. See, *e.g.*, *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 108 (1941) (referring to removal as "a right which can only be conferred by Act of Congress"); see also *Oklahoma Tax Comm'n* v. *Graham*, 489 U.S. 838, 841–842 (1989) *(per curiam)*; *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 (1983). As much as or more than any issue of federal jurisdiction, the removal statutes are rightly subject to a rule of strict construction. *Shamrock Oil*, 313 U.S., at 108–109.

Most important for present purposes, only civil actions of which the federal district courts have "original jurisdiction" are potentially removable under §1441(a). See also §1441(b). In other words, §1441 reaches only those state suits that could have been filed in federal district court in the first place. *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392–393 (1987). That condition cannot be satisfied here. Diversity of citizenship was incomplete, a federal question did not appear on the face of respondent's well-pleaded complaint, and federal defenses are incapable of satisfying the original-jurisdiction condition in §1441. See *Rivet*, 522 U.S., at 472, 475–478 (distinguishing cases where federal law completely preempts state-law claims and replaces them with federal claims); *Caterpillar*, 482 U.S., at 392–393, 398–399.

A tight analogue is *Rivet*. The state court defendants in that case contended that removal was justified because a prior federal judgment assertedly extinguished the plaintiffs' claims in their entirety. 522 U.S., at 472. But the "fundamental [rule] under currently governing legislation" is that federal defenses cannot provide jurisdiction for removal under §1441. *Id.*, at 478. The same result should obtain in this case. *Rivet*'s holding and congressional policy would be flouted if simple citation of the All Writs Act made any difference; and, as explained below, ancillary enforcement jurisdiction is no answer either. Finally, the *Rivet* Court wisely simplified and hardened the limits on §1441 removal. See *id.*, at 477–478. As such, there can be no exception for prior adjudication of "complex" litigation, or state suits that "threaten the integrity" of prior federal rulings. Brief for Petitioners i. Considering the potential for abuse and the interference with pending state litigation, this Court should maintain relatively clear and clean boundaries for the removal statutes. Petitioners' position sacrifices that clarity along with the principle of limited federal jurisdiction.

B. The All Writs Act Is No Cure for the Absence of Original Jurisdiction.

At times petitioners have suggested that the All Writs Act provides the necessary original jurisdiction. See J.A. 60–62. But petitioners have commendably disavowed any such position here. See Brief for Petitioners 6, 9 (acknowledging that the Act is not an independent basis for federal jurisdiction). The All Writs Act only grants certain writ authority when "in aid of" a federal court's existing jurisdiction conferred by Congress. See, *e.g.*, *Clinton* v. *Goldsmith*, 526 U.S. 529, 534–535 (1999); *Rosenbaum* v. *Bauer*, 120 U.S. 450, 456–459 (1887) (involving removal); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 188, n. 19 (1977) (Stevens, J., dissenting). There can be no rational argument, then, that the All Writs Act somehow repeals the

original-jurisdiction condition for those proceeding under §1441. Removal under that provision was improper.

C. Ancillary Enforcement Jurisdiction Is No Cure.

Petitioners now contend that the Alabama federal district court obtained ancillary enforcement jurisdiction over respondent's Louisiana state suit once the federal settlement was approved and incorporated into the district court's judgment. Even if that argument was properly preserved for review here, it could not justify removal.

Precedent understandably confirms that federal courts possess authority to enforce their judgments. *Peacock* v. *Thomas*, 516 U.S. 349, 356 (1996). Whatever other purposes the federal courts may serve, they must at least be able to adjudicate individual disputes; and adjudication implies resolution with some degree of finality and practical effect. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218–219 (1995); see also *New York Tel.*, 434 U.S., at 188–189 (Stevens, J., dissenting). Federal courts accordingly may retain jurisdiction to exercise this enforcement authority in post-judgment supplementary proceedings. *Peacock*, 516 U.S., at 356–357; see *Kokkonen*, 511 U.S., at 379–381.

But these concepts fall far short of this case. Ancillary "enforcement" jurisdiction permits a federal court to entertain *enforcement* proceedings.[3] Thus the Alabama

[3] See, *e.g.*, *Peacock*, 516 U.S., at 356–357; *Kokkonen*, 511 U.S., at 381 (posing a hypothetical in which the federal district court would have had jurisdiction "to enforce" the settlement agreement); *Dugas* v. *American Surety Co. of N.Y.*, 300 U.S. 414, 420–422, 427–429 (1937) (involving a supplemental bill to enjoin a litigant from further prosecuting an unremovable state suit that would have imposed liability foreclosed by prior federal interpleader decrees); *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 238–242, 244 (1934); *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356, 357–358, 367 (1921); *Dietzsch* v. *Huidekoper*, 103 U.S. (13 Otto) 494 (1880); see also *New York Tel.*, 434 U.S., at 171–178;

(Continued on following page)

federal district court retained jurisdiction to consider a motion by petitioners for declaratory relief, or for an injunction ordering respondent to dismiss his state suit. But petitioners incorrectly equate federal jurisdiction over efforts to *enforce* a federal court's judgment with federal jurisdiction over lawsuits that happen to *violate* that judgment. Whatever the arguable limits to ancillary enforcement jurisdiction, respondent's state suit is obviously not an enforcement action. That the federal district court in this case might have issued orders to halt state litigation does not convert that federal tribunal into a state-court substitute. Under petitioners' theory, could respondent or other parties to the settlement now choose to file non-diverse state-law exposure suits against the federal defendants in Alabama federal district court? If a federal settlement precludes certain administrative claims or requires certain executive branch actions, is the district court then permitted to appropriate those claims or itself discharge those duties? Cf. *Missouri* v. *Jenkins*, 495 U.S. 33, 50–51, 55 (1990) (addressing district court authority to order local property tax increases). The answer must be no.

That petitioners sought *removal* of the state suit only makes matters worse. Neither petitioners nor their *amicus* identify precedent for solely ancillary removal jurisdiction. There is no such beast. For the reasons just stated, §1441(a)'s original-jurisdiction demand could not have been satisfied. Ancillary enforcement jurisdiction at most permits the Alabama federal court to consider whether to halt, not whether to adjudicate, a state suit over which it otherwise lacks jurisdiction.

id., at 188 (Stevens, J., dissenting); *Julian* v. *Central Trust Co.*, 193 U.S. 93, 112–114 (1904); *Root* v. *Woolworth*, 150 U.S. 401, 411–412 (1893); *Milwaukee & Minn. R.R. Co.* v. *Soutter*, 69 U.S. (2 Wall.) 609, 631–635 (1865).

In addition, §1441 is best read to prohibit removal if subject matter jurisdiction depends on a separate federal suit that is already pending in a particular federal district court.[4] It is the "civil action brought in a State court" over which the district courts must have "original jurisdiction." §1441(a). But by definition ancillary jurisdiction is dependant rather than "original" in the sense that the statute uses that term. As well, §1441(a) demands extant original jurisdiction in "the district courts," plural. Accord §1441(b). That phrasing at least implies that the state suit must fall within the subject matter jurisdiction of any federal district court. In contrast, the ancillary enforcement jurisdiction decisions indicate that such jurisdiction resides, if at all, in the one district court with a decree to enforce. See, *e.g.*, *Local Loan*, 292 U.S., at 239. And in cases like this, where the state suit was filed in a place outside the geographic boundaries of the federal district court with asserted ancillary jurisdiction, §1441 removal would require the local federal district court to assume jurisdiction that even defendants would not argue has been retained. See §1441(a) (directing removal to "the district court" (singular) "for the district and division embracing the place where such action is pending"); §1446(a). Transfer can be requested, as it was here. But

[4] This conclusion is regularly followed by lower federal courts in an analogous context: attempts to remove a state suit on the theory that the suit falls within the supplemental jurisdiction attendant to an already pending federal suit. 28 U.S.C. §1367; see, *e.g.*, *Henson* v. *Ciba-Geigy Corp.*, 261 F.3d 1065, 1068, n. 3 (CA11 2001) (case below); *Ahearn* v. *Charter Township of Bloomfield*, 100 F.3d 451, 456 (CA6 1996); *Sebring Homes Corp.* v. *T.R. Arnold & Assocs.*, 927 F. Supp. 1098, 1101–1102 (N.D. Ind. 1995); *In re Estate of Tabas*, 879 F. Supp. 464, 467 (E.D. Pa. 1995); see also *McClelland* v. *Longhitano*, 140 F. Supp. 2d 201, 202–203 (N.D.N.Y. 2001) (state court defendants filed a federal action and simultaneously sought removal under §1367 of the pending state suit); cf. *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156, 165 (1997) (§1367(a) applies when other, federal claims are removed). But see *Cohen* v. *Reed*, 868 F. Supp. 489, 494 (E.D.N.Y. 1994) (nevertheless remanding).

that *exercise* of judicial authority is hardly a substitute for *jurisdiction* to do so in the first place. Cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998) (rejecting hypothetical jurisdiction).

Recognizing a difference between jurisdiction to consider enforcement measures and jurisdiction over state suits alleged to violate prior federal decrees is not splitting hairs. The former maintains the traditional authority of the federal courts to adjudicate requests for relief when otherwise permitted by law. But under petitioners' theory, mere allegations of preclusion in a removal petition can trigger immediate and wholesale interference with ongoing state-court business. Yet defendants cannot be trusted to assert only valid enforcement claims. Granted, in some situations the statutorily authorized grounds for removal may be doubtful. But that situation was one that Congress created. Judicially minted and amorphous extensions of removal jurisdiction, whether under ancillary enforcement jurisdiction or otherwise, should not be tolerated.

II. THE ALL WRITS ACT DOES NOT PROVIDE ANY REMOVAL AUTHORITY.

Petitioners' revision of the question presented does not refer to the removal statutes at all, see Brief for Petitioners i, and their new question might better fit their current theory of the case. Petitioners now assert that the All Writs Act is an additional statutory mechanism with which federal courts may obtain removal jurisdiction over suits within some federal court's ancillary enforcement jurisdiction — at least when that court retained post-judgment jurisdiction over "complex" litigation. As discussed above, federal district courts do not possess ancillary enforcement jurisdiction over state lawsuits that allegedly violate prior decrees. But in addition to that jurisdictional deficiency, there is no unwritten removal mechanism in §1651(a) or anywhere else.

As an initial matter, it is not clear which portions of the removal statutes petitioners are willing to follow and which would be superseded by the All Writs Act. In fact, the All Writs Act was not the (only) "mechanism" that they used. Petitioners relied on the grant of removal jurisdiction to the local federal district court in Louisiana under §1441(a) and they filed their removal notice there, see §1446(a); but they do not explain why that particular court possessed jurisdiction. See Argument Part I.C., *supra*. Likewise, petitioners enjoyed the automatic stay of state proceedings in §1446(d); but they do not explain how defendants in their position can ever file a timely removal notice under §1446(b). Cf., *e.g.*, §§1441(d), 1442a (express exceptions to the timing provision in §1446(b)). Nor do we know whether §1447(c) will govern the procedure for remand motions and orders for attorney fees, or whether such remands will be appealable despite §1447(d).

Regardless of the procedural edifice that petitioners would have federal courts fabricate to answer such questions, the removal statutes represent the sum total of the judiciary's removal authority. This was true from the beginning.

A. Evidence of Original Intent Bars Removal.

We can be quite certain that the initial grant of residual writ authority in 1789 did not include unwritten removal authority. The first Judiciary Act exercised Congress' then-controversial authority to establish lower federal tribunals,[5] and granted all federal courts "power to

[5] See R. Fallon, Jr., *et al.*, Hart and Wechsler's The Federal Courts and the Federal System 19–20, 28–29, 31 (4th ed. 1996) (hereinafter Hart & Wechsler); F. Frankfurter & J. Landis, The Business of the Supreme Court 2, 4, 11–12 (1928); C. Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 53–57, 61–70, 81, 90–92, 119–127, 130–132 (1923).

issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." An Act to establish the Judicial Courts of the United States, ch. 20, §14, 1 Stat. 73, 81–82 (1789).

At the very same time, the Judiciary Act also created federal removal jurisdiction, *id.*, §12, 1 Stat. 79–80, an innovation within our unique system of co-existing state and federal power. As now, the founding era removal jurisdiction included several significant limitations, which are understandable in light of its novelty and intrusion into state prerogatives. Thus removal was confined to a specified class of cases, such as those involving a plaintiff suing an out-of-state defendant in the plaintiff's home state if the amount in controversy exceeded $500. *Id.*, at 79. As well, removal was proper only to the local circuit court (excepting Maine and Kentucky, which had no separate circuit courts), rather than to a district court or to this Court. *Ibid.* Removal premised on federal questions was not authorized at all.

It is inconceivable that removal authority beyond §12 was lodged in §14. The former provision specifically and meticulously addressed the subject of removal, the classes of cases eligible therefor, and the procedure by which removal would be effectuated. Having described the eligible cases, Congress could not have intended the same Act to extend this novel ouster of state jurisdiction by mere ambiguity. Cf. *id.*, §§9, 11, 1 Stat. 76–79 (providing instances of exclusive jurisdiction in the lower federal courts). Furthermore, if any removal authority existed in §14, could removal have been premised on a federal question despite Congress' decision to withhold general federal question jurisdiction (whether by removal or otherwise)? And which federal courts could have exercised it and by what procedure? The All Writs authority was granted to every federal court, while Congress made

conscious decisions to restrict removal venue and procedure. Nothing in the original statute or its context suggests that these legislative choices could be trumped by the residual writ authority included in the same piece of legislation. Indeed our system survived for nearly two centuries without a single federal court assuming removal authority under the All Writs Act. See L. Hoffman, Removal Jurisdiction and the All Writs Act, 148 U. Pa. L. Rev. 401, 401–402 (1999).

B. Contemporary Law Confirms the Conclusion.

No intervening event suggests that All Writs removal authority has sprouted since 1789. The All Writs statutory phrasing has changed only slightly over that period; since 1948 it has granted federal courts authority to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a); see *Pennsylvania Bureau of Corrections* v. *United States Marshals Serv.*, 474 U.S. 34, 40–42 (1985) (concluding that the 1948 recodification did not "mark a congressional expansion of the powers of federal courts to authorize issuance of any 'appropriate' writ").

As for removal, over time Congress has expanded and contracted the authority depending on contemporary necessities. Responding to acute threats to federal power while cognizant of the impact on state and federal dockets, the Legislative branch has been the prime arbiter of removal authority. And this Court's consideration of removal authority has been bounded by those statutes. See, *e.g.*, *Mesa* v. *California*, 489 U.S. 121, 125–126, 135, 139 (1989) (addressing federal officer removal); *Caterpillar*, 482 U.S., at 399 (addressing §1441's original-jurisdiction condition); see generally Hart & Wechsler, *supra*, at 951–952, 1615–1616 (providing a history of legislative amendments to the removal statutes).

The better conclusion, therefore, is that Congress has exhausted the mechanisms for removal by statute. The United States Code is now littered with statutory provisions expressly addressing removal of cases from state to federal court in a variety of circumstances. The All Writs Act is not one of them. See, *e.g.*, 9 U.S.C. §205; 12 U.S.C. §§632, 1819(b)(2)(B)–(D); 22 U.S.C. §286g; 28 U.S.C. §§1441–1452, 2679(d)(2)–(3); 39 U.S.C. §409(a). As significant, petitioners cite no case in which this Court has implied removal authority from a statute that did not expressly provide for it. Accord *Oklahoma Tax Comm'n*, 489 U.S., at 841 ("Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities").

With congressional policy ascertained, All Writs analysis must end. The All Writs Act cannot trump congressional intent to limit removal authority. And, in addition, writs otherwise "'covered'" by statute are not available under §1651(a). *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (quoting *Pennsylvania Bureau*, 474 U.S., at 43); see also *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 29–32 (1943); *United States* v. *FMC Corp.*, 84 S.Ct. 4, 5–6, 8 (1963) (Goldberg, J., in chambers); cf. *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 202–204 (1945) (enforcing by writ a congressional policy limiting federal jurisdiction). "Where a statute," let alone a bevy of them, "specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pennsylvania Bureau*, 474 U.S., at 43.

Finally, federalism concerns should resolve any doubts against All Writs authority. Not only are the removal statutes sufficiently comprehensive to foreclose supplementation, but judicial expansion of removal authority improperly impinges on state judicial business. Removal does not just obstruct state courts in their obligations to timely adjudicate state-law claims. It utterly and (under

§1446(d) or some phantom All Writs companion) immediately deprives them of jurisdiction. Congress and the Court are well aware of that consequence, and in defining the scope of the removal statutes both institutions have respected the interests of state judiciaries and their claimants.[6] An alleged "crisis" is no occasion for the judiciary to re-mark boundaries on its own power. See *Lexecon*, 523 U.S., at 40; *Amchem*, 521 U.S., at 628–629.

There may be no simple and comprehensive way to state exactly when resort to the All Writs Act is appropriate. But essential elements in the equation must include deference to congressional choices and respect for state judiciaries. Petitioners' argument devalues both.

---

[6] Authorities cited by petitioners and their *amicus* do not confront these concerns. See, *e.g.*, *New York Tel.*, 434 U.S., at 161 (pen-register order to an in-state telephone company); *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966) (preliminary injunction against private parties' merger in part to preserve status quo for agency resolution and subsequent judicial review); *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957) (supervisory authority over lower federal courts); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 272–274 (1943) (habeas corpus after a federal conviction); *United States* v. *Morgan*, 346 U.S. 502 (1954) (coram nobis after a federal conviction); *McClellan* v. *Carland*, 217 U.S. 268 (1910) (certiorari to the federal courts of appeals); cf. *Carlisle*, 517 U.S., at 429 (recent treatment of coram nobis in light of the modern rules of criminal procedure); *Sampson* v. *Murray*, 415 U.S. 61, 76–78 (1974) (distinguishing *Dean Foods*). Obviously the All Writs Act may permit some interference with state interests. See *Harris* v. *Nelson*, 394 U.S. 286, 288–292, 299 (1969) (supplementing expressly granted habeas jurisdiction to adequately assess collateral constitutional claims to liberty). But see 28 U.S.C. §2283 (limiting authority to interfere with pending state suits); Argument Part II.C.2., *infra*. Still, a federal court's legitimate power to issue creative writs must be at low tide when beset by a combination of federalism and separation-of-powers concerns — especially where there are established alternative avenues for seeking more traditional and practically effective relief. See Argument Part II.C., *infra*.

C. Removal Is Unnecessary to Protect the Federal Judiciary Or Defendants' Interests.

Petitioners and their *amicus* attempt to convert the vice of statutory limits into a virtue. They believe that the conditions in the removal statutes actually justify All Writs removal, because the exact relief sought cannot otherwise be obtained.

Precedent indicates that All Writs relief is available only if "necessary" in some sense, and so it is plainly *un*available if other "adequate" remedies exist. See *Clinton*, 526 U.S., at 537; *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980) *(per curiam)* (mandamus to an inferior federal tribunal is barred if the requesting party has any other adequate means to obtain the requested relief); see also *New York Tel.*, 434 U.S., at 175 (arguing necessity from the *court's* perspective); *Dean Foods*, 384 U.S., at 604. But litigant need and restrictions on other statutory authority cannot be a *sufficient* condition for relief. That would be a recipe for disregard of congressional will. Absent a constitutional violation, All Writs relief must be prohibited when Congress so intends. As shown above, the best reading of the removal statutes is that the All Writs Act has been appropriately confined by Congress. *New York Tel.*, 434 U.S., at 172–173.

Moreover, the All Writs Act is not triggered whenever a litigant cannot obtain elsewhere the precise remedy that he has requested. Rough substitutes can bar recourse to the All Writs Act. See *Clinton*, 526 U.S., at 537–540; *Allied Chem.*, 449 U.S., at 36. That petitioners cannot remove respondent's state suit should be irrelevant considering the sole purpose for which they seek relief: to halt a state suit based on a prior federal judgment. Even if petitioners are correct on the merits of their preclusion arguments, there is absolutely no need — from the perspective of either the litigants or of the federal courts — for removal to achieve the objective.

1. State-court defense. Most important, state courts retain the ability and duty to fairly adjudicate defenses like those asserted by petitioners. Indeed, Congress and precedent favor that course to unauthorized removal. See *Rivet*, 522 U.S., at 477–478. State courts are entirely capable of resolving alleged conflicts between federal judgments and pending state suits. They are just as obligated to effectuate federal law as are federal courts, and this Court ordinarily presumes that state courts will follow rather than flout federal law. See, *e.g.*, *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990); *Chick Kam Choo*, 486 U.S., at 149–150; *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 15–17 (1987); *Stone* v. *Powell*, 428 U.S. 465, 493–494, n. 35 (1976); *Amalgamated Clothing Workers of Am.* v. *Richman Bros.*, 348 U.S. 511, 518 (1954). Unlike the situation in cases such as *New York Telephone*, 434 U.S., at 175, and *Dean Foods*, 384 U.S., at 599–600, the underlying controversy turns on state law and a state judicial forum has already acquired jurisdiction — with which it is able to ensure that federal law is vindicated.

While there are legitimate arguments that the court issuing a judgment is the most efficient place to consider its scope, such concerns have never been parlayed into exclusive federal jurisdiction. See *Parsons Steel, Inc.* v. *First Ala. Bank*, 474 U.S. 518, 524–25 (1986) (rejecting an anti-suit injunction where the state court had already denied preclusion); see also *Kokkonen*, 511 U.S., at 381; *Atlantic Coast Line*, 398 U.S., at 287. Even when a dispute over a judgment is close enough in time to the prior adjudication to warrant a presumption that the first court is better prepared than a second, but cf. Brief of Product Liability Advisory Council, Inc. (PLAC) as *Amicus Curiae* 26–29 (posing questions about back-end opt-outs), different judicial systems regularly interpret the preclusive scope of judgments entered by others. And the preclusive effect of a federal district court's judgment when sitting in diversity is only technically a matter of federal common law; the actual rule of decision will almost certainly

incorporate state preclusion rules. See *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 508–509 (2001).

Petitioners are free to defend themselves in state court, and that is no punishment. Fear that state courts will not follow federal law is no ground for removal. *Chicago & A.R. Co.* v. *Wiggins Ferry Co.*, 108 U.S. 18, 24 (1883).

2. Anti-suit injunctions. Based on the argument above, the Court need not consider the authority of the Alabama district court to issue an anti-suit injunction. But the possibility of an injunction and the presence of the Anti-Injunction Act can only undermine the argument for All Writs removal.

First, any authority to remove a case outside of the removal statutes must not be any broader than the authority to issue a stay of state proceedings. To make removal effective, a stay of state proceedings is required (or at least that is what defendants are agitating for). Yet Congress has imposed express limits on such stays in the Anti-Injunction Act. 28 U.S.C. §2283. Although there are a variety of additional restrictions on anti-suit injunctions,[7] the demands of the Anti-Injunction Act must be satisfied or there is no authority to interfere with pending state proceedings "regardless of how extraordinary the particular circumstances may be." *Mitchum* v. *Foster*, 407 U.S. 225, 229 (1972); see, *e.g.*, *Chick Kam Choo*, 486 U.S., at 146; *Atlantic Coast Line*, 398 U.S., at 286–87 (the bar applies even when an injunction is directed at a party rather than a state court). "[S]ince the statutory prohibition against such injunctions in part rests on the

---

[7] These include personal jurisdiction, due process, abstention, and equitable discretion to deny relief. See, *e.g.*, *Ortiz*, 527 U.S., at 846–848; *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811–812 (1985); *Younger* v. *Harris*, 401 U.S. 37, 43–45 (1971); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969); *Local Loan*, 292 U.S., at 241–242; Monaghan, *supra*, at 1149–1155, 1187–1191; see also Fed. R. Civ. P. 65(d).

fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction." *Atlantic Coast Line*, 398 U.S., at 287; accord *Chick Kam Choo*, 486 U.S., at 146. Doubts about the propriety of an injunction must be resolved in favor of permitting the state courts to move forward without delay. *Atlantic Coast Line*, 398 U.S., at 297.

In cases like this, the defendants' rationale for removal authority (that the state suit is purportedly precluded by a prior federal decree) may establish authority to issue an anti-suit injunction. Section 2283 permits federal courts to consider whether to issue an anti-suit injunction that is "necessary to protect or effectuate the court's judgment." *Chick Kam Choo*, 486 U.S., at 146. This relitigation exception has been narrowly construed: "the claims or issues which the federal injunction insulates from litigation in state proceedings [must] actually have been decided by the federal court," and an injunction can rest only on what the federal court's prior order actually said, not on what it intended to say. *Id.*, at 148. Nevertheless, a preclusion argument like petitioners' might satisfy the relitigation exception; and if that argument fails on its merits, then not even petitioners would contend that removal is authorized. On this logic, petitioners' *amicus* contends that a meritorious preclusion argument triggers both injunctive and removal authority, and district courts should be left with discretion to choose between them.

This argument fails for several reasons. First, in PLAC's view, defendants seeking All Writs removal are apparently entitled to an automatic stay of state proceedings, without prior judicial oversight, upon filing of a removal notice and allegation of preclusion (at least after settlement of "complex" federal litigation). Cf. §1446(d). The "choice" a district court would face after finding that a preclusion defense is meritorious, therefore, would *not* be between an anti-suit injunction and removal, but between

remand with an anti-suit injunction and dismissal. Assuming complete preclusion, the only purpose for remand would be to test whether the state court can obey a federal diktat. And in those cases where the defendant's preclusion defense is *not* meritorious, neither removal nor injunction will be authorized, and so a straight remand will be compelled. But in all events the defendant will have succeeded in obstructing state adjudication and the plaintiff's valid forum choice, based on a federal defense. That is not the way the deck has been stacked by Congress or this Court. See, *e.g.*, *Rivet*, 522 U.S., at 477–478; *Parsons Steel*, 474 U.S., at 524–25.

That aside, removal and anti-suit injunctions are *not* equally available choices. As argued above, federal courts lack subject matter jurisdiction over state suits like this and the All Writs Act lacks any removal authority. In addition, the Anti-Injunction Act itself suggests that injunctions are congressionally preferred to an expanded removal authority. In amending the Anti-Injunction Act into its present form, Congress assessed the interests at stake and the argument for preserving a federal forum for preclusion defenses. See *Toucey*, 314 U.S., at 132, 141 (pre-amendment decision refusing to acknowledge a relitigation exception absent statutory authorization). Congress well could have altered the removal statutes too, or made federal jurisdiction over these defenses exclusive, but it did not. Moreover, removal is the greater intrusion into state judicial proceedings, especially if a mere notice of removal ousts the state court of authority to proceed, or if the state plaintiff's case ends up only partly precluded. Removal deprives state courts of all authority over a case, while anti-suit injunctions are ordinarily issued to litigants and can (indeed must) be targeted to prevent relitigation of only those issues previously adjudicated. See *Chick Kam Choo*, 486 U.S., at 148. So far as we can tell, petitioners envision wholesale removal of entire state cases while a federal district court considers whether all or any of the state case is precluded.

Petitioners' *amicus* directs attention to federal settlement agreements that contain so-called "back-end opt-outs" as an example where removal would create less federal-state friction than anti-suit injunctions. Brief for PLAC 25–29. Even assuming that such restrictions on class members are valid, they do not justify removal. First of all, the friction-*free* alternative is to permit state proceedings to progress unhindered by either removal *or* injunction. Federal courts are at liberty to withhold All Writs relief, particularly if a state forum exists to adjudicate preclusion defenses. Second, the hypothetical situation presented involves state claims that are only partly precluded by a federal settlement; some of the claims will go forward. In what sense is it more intrusive to order an amendment of claims than to assert exclusive jurisdiction over an entire state case (one that lacks an independent basis of federal subject matter jurisdiction) only to remand the remainder of the case? Shuttling cases back and forth is no boon to federalism either.[8] Furthermore, insofar as PLAC's hypothetical involves injuries and claims that arise long after a federal settlement, the rationale for federal adjudication is undercut. Long lags between judgment and dispute make it less clear that a federal court is the better arbiter of aging documents.

Indeed an assurance that a federal court will arbitrate all disputes over the meaning of its decrees risks excessive tolerance for vagueness in drafting those decrees. Particularly when the rights of future victims are at stake, federal settlements must be absolutely plain to any reader. Taking care up front will better enable state courts to easily and fairly adjudicate preclusion defenses. Moreover, absent

[8] It is possible that PLAC believes state cases should remain in federal court even after they are determined to be partly preserved. But that would be extraordinary. At that point, the rationale and necessity for federal jurisdiction would have vanished even under PLAC's position. Federal courts would be adjudicating *un*precluded state law claims, while wholly lacking original jurisdiction.

and unnamed class members have a right to collaterally challenge a purported judicial resolution of their claims. See Monaghan, *supra*, at 1149–1150, and n. 4, 1185–1187, 1197; see also *Ortiz*, 527 U.S., at 846–848. An opportunity for non-participants to collaterally challenge in Court B the fundamental fairness of Court A's proceedings is a useful check on judicial authority and on any urge to sacrifice individual rights while clearing dockets. PLAC's proposal would effectively eliminate this check on federal class actions.[9]

[9] In the class-action context, some lower federal courts have become willing to issue injunctions against state suits before judgment and to promote the chances of reaching a global federal settlement. See PLAC Br. 24, n. 7. But see *In re Federal Skywalk Cases*, 680 F.2d 1175, 1182–1183 (CA8), *cert. denied*, 459 U.S. 988 (1982); *In re Glenn W. Turner Enterprises Litig.*, 521 F.2d 775, 780 (CA3 1975). These pre-judgment injunctions are a matter of intense controversy within the practicing bar. In TLPJ's view, they conflict with the narrow, traditional understanding of what is "necessary in aid of [a district court's] jurisdiction." 28 U.S.C. §2283; see *Atlantic Coast Line*, 398 U.S., at 295–296 (citing *Kline*); *Kline*, 260 U.S., at 229–230 (distinguishing *in personum* from *in rem* jurisdiction); see also *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 641–643 (1977) (plurality opinion of Rehnquist, J.); *County of Imperial* v. *Munoz*, 449 U.S. 54, 60, n. 4 (1980). These injunctions have little to do with the federal judiciary's ability to adjudicate the cases properly before them, but they seriously interfere with state courts' ability to do the same. But far more importantly, the necessary-in-aid-of-jurisdiction exception to the Anti-Injunction Act is not before the Court, and we ask that the excursions of the lower courts receive no endorsement whatsoever in the Court's decision.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ARTHUR H. BRYANT
TRIAL LAWYERS FOR PUBLIC JUSTICE
One Kaiser Plaza
Suite 275
Oakland, CA 94612
Telephone: (510) 622-8150

MICHAEL J. QUIRK
TRIAL LAWYERS FOR PUBLIC JUSTICE
1717 Massachusetts Ave. NW
Suite 800
Washington, DC 20036
Telephone: (202) 797-8600

ADAM SAMAHA
Counsel of Record
ROBERTA B. WALBURN
MARTHA K. WIVELL
ROBINS, KAPLAN, MILLER & CIRESI, L.L.P.
2800 LaSalle Plaza
800 LaSalle Ave.
Minneapolis, MN 55402-2015
Telephone: (612) 349-8500

Attorneys for Amicus Curiae